78-377

THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

GILBERT D. SCUDDER,

Appellant,

vs.

FLORIDA POWER CORPORATION, a Florida corporation, L. M. FOLSOM and PAULINE FOLSOM, his wife.

Appellees.

APPENDIX TO

APPELLANT'S JURISDICTIONAL STATEMENT

Jack B. Nichols, Esq.
R. Wayne Evans, Esq. of
NICHOLS & TATICH, P.A.
P.O. Box 33
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Orlando, Florida 32802
305/841-8823
Attorneys for Appellant

CONTENTS OF APPENDIX

SUPREME COURT OF FLORIDA

Filed: TUESDAY, JUNE 6, 1978

GILBERT D. SCUDDER, et ux,

Petitioners, Case No. 52,856

v. DISTRICT COURT OF APPEAL, SECOND DISTRICT

FLORIDA POWER CORPORATION, et al., 76-1005 76-1006

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., ADKINS, BOYD, ENGLAND and SUNDBERG, JJ., concur.

A True Copy

TEST

Sid J. White
Clerk Supreme Court

By /s/Tanya Carroll
Deputy Clerk

TC
cc: Hon.William A. Haddad, Clerk
Hon.Wallace E. Sturgis, Jr., Judge
Hon.James C. Watkins, Clerk

R. Wayne Evans, Esquire
Jack B. Nichols, Esquire
John H. Rhodes, Jr., Esquire
C. Brent McCaghren, Esquire

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JULY TERM, A. D. 1977

FLORIDA POWER CORPORATION

Appellant,

v. CASE NO. 76-1005

GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM his wife,

Appellees

L.M.FOLSOM and PAULINE FOLSOM, his wife,

Appellants,

vs. CASE NO. 76-1036

GILBERT D. SCUDDER, et al.,

Appellees.

Opinion filed September 16, 1977.

Appeals from the Circuit Court for Lake County; Wallace E. Sturgis, Jr., Judge

C. Brent McCaghren of Winderweedle, Haines, Ward & Woodman, Winter Park, for Florida Power Corporation

Jack B. Nichols and R. Wayne Evans of Nichols & Tatich, Orlando, for Gilbert D. Scudder.

John H. Rhodes, Jr., Winter Garden, for L. M. Folsom and Pauline Folsom.

SCHEB, Judge.

The principal issue in these consolidated appeals is whether the trial court erred in awarding compensatory and punitive damages against a utility company, Florida Power Corporation (FPC) for placing its electric poles and lines across privately owned lands without permission of the owners. Additionally, we address challenges to the compensation awarded the servient owners for a statutory way of necessity, as well as the court's rejection of claims to a common law easement or prescriptive right by the landowners served by the utility lines.

The essential facts are these: In April 1973 L. M. and Pauline Folcom acquired an eighty-acre tract of land in

Lake County. Since the tract was land-locked, the Folsoms proceeded to construct a clay road from their property across land owned by Gilbert D. and Irene J. Scudder to an existing county road. While building the road the Folsoms requested FPC to install electric services to their new premises. A customer service representative of FPC, familiar with the area, visited the Folsoms who were in the process of having a road graded across the Scudders' property. Piles of clay were along the road and Mr. Folsom told FPC's representative that he was putting in the road and that it was his clay, and even mentioned how much it was all costing him. Based on these facts, the FPC representative mistakenly assumed the Folsoms owned or at least had legal right to use the property. Mr. Folsom never told the FPC representative that he did not own the property, nor did he disclose that he had no legal right to place the roadway

across it. Acting upon Folsom's request and representations, and without making any independent determination of the ownership of the lands, FPC's employees erected poles and distribution lines to serve the Folsoms' needs. No surveys were made, permits obtained, or land records checked by FPC before its installation was accomplished.

Upon learning the Folsoms were building the road, in October 1973 the Scudders (who lived in New York) contacted the Folsoms advising them the road was in violation of their property rights. The Scudders also had a fence erected and signs posted to protect their property. Nevertheless, the Folsoms disregarded these warnings and in November 1973 permitted FPC to install their lines.

The Scudders sued FPC in one action and the Folsoms in another. In the former action they charged that FPC wrongfully placed its utility poles and distribution

lines on their lands; in the latter they contended the Folsoms trespassed by constructing and using a road on their lands. In the latter suit the Scudders alternatively prayed that should the Folsoms be entitled to a statutory way of necessity, that the court establish the same and award them reasonable compensation and attorneys' fees. Scudders sought compensatory and punitive damages in both actions.

FPC and the Folsoms answered and counterclaimed, asserting a right-of-way over the Scudders' property on theories of: (1) prescriptive right; (2) implied common law right-of-way; or (3) statutory way of necessity. Prior to trial, FPC filed a cross-claim against the Folsoms, demanding indemnity for any damages that it might be required to pay to the Scudders.

As the causes proceeded to trial they were consolidated. Unfortunately,

Mrs. Scudder died in the interim, but Mr. Scudder continued the actions.

The trial court first heard evidence on the Folsoms' affirmative claims. After rejecting their claims of prescriptive right and implied common law right-of-way, the court concluded the Folsoms were entitled to a statutory way of necessity thirty feet in width across Scudder's lands as "reasonably necessary for ingress and egress by persons, vehicles, stock and electricity and telephone services thereon."

Thereafter, by agreement of the parties the court in a nonjury trial considered the remaining issues and awarded the Scudders $7,400 compensation for the statutory way of necessity. FPC was held liable to them for $500 compensatory and $25,000 punitive damages for its trespass. The court determined that two of the utility poles were placed nine and twelve feet, respectively, outside the areas

designated by the court. FPC was ordered to relocate the poles and lines within the confines of the way of necessity. The trial court denied FPC's cross-claim for indemnity against the Folsoms.

The trial court correctly determined Folsoms did not acquire any common law easement. There was no evidence that any common source of title between the dominant and servient estates had caused the Folsom's property to be landlocked. See Hanna v. Means, 319 So. 2d 61 (Fla. 2d DCA 1975); Stein v. Darby, 126 So. 2d 313 (Fla. 1st DCA 1961).

Moreover, the trial court did not err in its ruling that the Folsoms failed to establish a prescriptive right. To do so a claimant must show an identifiable parcel of land has been used openly, notoriously, continuously, and uninterruptedly for a period of twenty years. Zetrouer v. Zetrouer, 103 So. 625 (Fla. 1925). The Folsoms had only recently

commenced their use and the trial judge properly concluded that the uses of the Scudders' land by Folsoms' predecessors had been permissive rather than adverse. This defeats the claim by prescription. See Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974); Burdine v. Sewell, 109 So. 648 (Fla. 1926).

The trial judge correctly awarded the Folsoms a statutory way of necessity under Section 704.01(2), Florida Statutes (1975).

The award of $7,400 challenged by Scudder as inadequate and by the Folsoms as excessive, is sustained by competent and substantial evidence. Further, the trial court was correct in not awarding counsel fees to a servient landowner where a way of necessity is established. Estate of Hampton v. Fairchild-Florida Construction Co., 341 So.2d 759 (Fla. 1977).

The trial judge could just as logic-

ally have awarded a way of necessity wide enough to include the existing utility lines. He did not, and we cannot say he erred as a matter of law in failing to do so. Rather, we think that determination of the statutory way of necessity under Section 704.01(1) is a matter where the trial judge enjoys considerable discretion. An abuse of that discretion has not been shown.

We agree that FPC committed a trespass when it placed its poles and lines on the Scudders' lands. The trial court erred in awarding punitive damages against FPC.

The trial court found:

> The evidence thus reveals a policy of the Defendant FLORIDA POWER CORPORATION that was so careless and unconcerned with the rights of property owners that it would proceed to establish a distribution line in the face of a series of facts that no right of way in fact existed for the placement of the distribution poles.

Concluding that FPC had willfully abused the rights of the Scudders, the court

awarded them $25,000 punitive damages.

Evidence was introduced to show FPC followed the customary practice of utility companies in Lake County by requesting the Folsoms to relate any disputed boundaries or ownership problems. While FPC concedes a mistake occurred, it claims it was misled by Folsom who did not disclose his lack of ownership of the lands. Moreover FPC points out that Folsom, who observed the installation of electric power lines across the Scudders' property did not even notify FPC of the protest letters he had received from the Scudders' attorneys.

A public utility should at least check the public records to determine the legal ownership of the lands on which it contemplates installing its lines. Prudence certainly dictates that a utility must obtain necessary easements or other legal sanctions from those whose property rights are to be affected before its poles and lines are installed.

Although mistaken and even careless about determining the ownership of the lands where it installed its poles and lines, Florida Power's conduct was not of a wanton character and was certainly not the type of outrageous wrong which warrants imposition of punitive damages. FPC's motivation was to bring utility service to a customer as it is obligated to do under its franchise. Its poles were located near an existing roadway over which its customer exercised apparent control. Its customers, the Folsoms, were ultimately found to be entitled to substantially the same area by way of necessity. Finally, the installation did not result in any damage to any structures or crops.

In Winn and Lovett Grocery Co. v. Archer, 171 So. 214, 222-23 (Fla. 1936), the classic case on punitive damages, the Florida Supreme Court said:

> Punitive or exemplary damages are allowable, however, solely as punishment or "smart money" to be inflicted for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right, and can only be imposed in cases where either by direct or circumstantial evidence some reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law on defendant's part may be legitimately drawn by the jury trying the case.

While the Scudders protested actions by the Folsoms, the record does not disclose such protest was communicated to FPC either by the Scudders or the Folsoms. Although we do not approve FPC's methods which resulted in a trespass on the lands owned by the Scudders, it would be unfair to impose what amounts to a civil fine against it. As we stated in Carter v. Lake Wales Hospital Association, 213 So. 2d 898 (Fla. 2d DCA 1968), even gross negligence, by itself, will not support punitive damages.

One final problem: The Folsoms and FPC apparently agreed that if FPC would

leave the distribution line and poles in place, the Folsoms would assume liability for its doing so. At trial the Folsoms stipulated that they would be responsible for compensatory damages levied against FPC for any continuing trespass during the pendency of the litigation. The Folsoms did not, however, assume liability for the initial trespass. As noted previously, the installation of the line and poles did not result in any damage to structures or crops. We feel it logical, therefore, to assume the $500 compensatory damages were levied against FPC for the continuing nature of the trespass rather than the initial trespass. This being the case, we view the stipulation as shifting liability for the $500 compensatory damages to the Folsoms.

Accordingly, the awards of compensatory and punitive damages against Florida Power Corporation are vacated and the trial court shall enter judgment in favor

of the Scudders and against the Folsoms for $500. In all other respects the trial court's judgment is affirmed.

Affirmed in part, reversed in part, and remanded for entry of a judgment consistent with this opinion.

BOARDMAN, C.J. and McNULTY, JC., Concur.

IN THE CIRCUIT COURT, IN
AND FOR LAKE COUNTY, FLORIDA

CASE NO. 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

v.

L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

AMENDED COMPLAINT

Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by and through their undersigned attorneys, sue the Defendants, L. M. Folsom and Pauline Folsom, his wife, and allege the following:

1. That Gilbert D. Scudder and Irene J. Scudder, his wife, are residents of Campbell, New York, and own property located in Lake County, Florida.

2. That the Defendants, L. M. Folsom and Pauline Folsom, his wife, are

residents of Lake County, Florida, and sui juris.

3. That this is an action for damages in excess of Two Thousand Five Hundred Dollars ($2,500.00) exclusive of interest and costs.

COUNT I

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above, and further allege:

4. That this is an action in trespass and for an injunction to prevent future trespasses.

5. That the Plaintiffs are entitled to relief against the Defendants upon the following facts:

(a) The Plaintiffs are, and at all times herein material to this Amended Complaint were, the owners of the following described property: together with improvements situated thereon located in Lake County, Florida, to-wit:

The SW 1/4 of the NW 1/4 of Section 12, Township 23 South, Range 26 East, of Tallahassee Meridian; and

West 1/2 of the SW 1/4 of Section 12. Township 23 South, Range 26 East, of Tallahassee Meridian.

(b) During the period between March 1, 1973, and October 18, 1973, the Defendants, by and through their respective agents, servants and employees then and there acting within the scope of their employment and in the performance of their duties duly assigned to them by said Defendants, entered upon the above described property without the consent of the Plaintiffs and did damage said property by disturbing the grade and level thereon, depositing clay thereon, and constructing a permanent clay road across the Plaintiffs' property; and did on or about the 22nd day of October, 1973, cut, tear down and remove the fencing and fence posts placed along the southern and western boundary of the aforesaid property without the Plain-

tiffs' consent.

(c) That the Defendants have wrongfully used and continue to use without the Plaintiffs' consent or permission the Plaintiffs' land upon which Defendants constructed a permanent clay road across the Plaintiffs' property for ingress and egress from their property, both for private and for commercial purposes for Defendants' own personal benefit and profit.

(d) The Defendants did commit the described acts of entry on and damage to the described property unlawfully and willfully, without regard to the property rights of the Plaintiffs, and with full knowledge, actual and constructive, that they had no right to do so, and did continue the described acts of trespass and damage after demand to cease and desist and after being actually advised of the Plaintiffs' rights.

6. As a direct and proximate

cause of the above described willful and wrongful acts of the Defendants, the property has been physically damaged, and the most valuable portion of the tract, along the edge of the lake, has been severed from the remainder, thereby decreasing the value of the whole parcel and the ability to consummate a sale of the subject property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition; the Plaintiffs have had to incur the expense of retaining the firm of Nichols & Tatich, P. A., to prosecute this action, and will incur the expense of putting said property back into its former condition.

WHEREFORE, the Plaintiffs demand compensatory and exemplary damages against the Defendants in excess of Two Thousand Five Hundred Dollars ($2,500.00), reason-

able attorneys' fees, the costs of this action, and that this Court issue its order enjoining the named Defendants from coming onto or crossing the property in question in the future, and Plaintiffs demand trial by jury of all issues so triable.

COUNT II

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Count I above, further allege:

7. That this is an action for ejectment from real property located in Lake County, Florida.

8. That the Plaintiffs own clear title to the property pursuant to the chain of title attached hereto as Exhibit A, which is superior to any claim of title of the Defendants.

9. That the Defendants are unlawfully occupying the real property of the

Plaintiffs, which is effectively denying Plaintiffs the full use, benefit and enjoyment of their property.

WHEREFORE, the Plaintiffs demand judgment for possession of the subject property, costs of this action, damages against the Defendants, and demand trial by jury of all issues so triable.

COUNT III

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I and II above, further allege:

10. That this is an action for unlawful detainer of certain lands located in Lake County, Florida.

11. That the Defendants have unlawfully taken possession of a strip of land across the subject property and constructed a road thereon without the permission or consent of the Plaintiffs and have used, and continue to use, said road for

private and commercial purposes and for their personal benefit and profit.

12. That the Plaintiffs hold clear title to the property pursuant to the chain of title attached hereto as Exhibit A.

WHEREFORE, Plaintiffs demand judgment against the Defendants for recovery of the premises together with the costs of this action and damages against the Defendants, and demand trial by jury of all issues so triable.

COUNT IV

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I, II and III above, further allege:

13. That this is an action for a mandatory injunction to remove a willful and continuing trespass.

14. That the Defendants, L. M. Folsom and Pauline Folsom, his wife, own

and possess certain premises in the vicinity of Plaintiffs' premises in Lake County, Florida, to-wit:

> The East 1/2 of the SE 1/4 of Section 11, Township 23 South, Range 26 East, Lake County, Florida.

15. That during the period between March 1, 1973, and October 18, 1973, the Defendant, by and through their respective agents, servants and employees acting within the scope of their employment and in the performance of their duties duly assigned to them by said Defendants, did without regard to the property rights of the Plaintiffs and with full knowledge, actual and constructive, that they had no right to do so, wilfully and intentionally enter upon the Plaintiffs' property and construct a permanent clay type of road from the Defendants' property across the Plaintiffs' property to connect with Clay Pit Road, a public thoroughfare, without the permission or con-

sent of the Plaintiffs; the Defendants and their agents have used, and continue to use to the present time, this road for private and commercial purposes, without the permission or consent of the Plaintiffs, for their personal benefit and profit.

16. That the Defendants were advised by a representative of the Plaintiffs prior to the installation of the aforesaid road, that they had no legal right to construct said road, but, notwithstanding said knowledge, they actively, willfully and maliciously disregarded said advice and secretly and without contacting Plaintiffs, went ahead and built said road; and further, after the Plaintiffs' attorney served notice upon the Defendants by letter, caused the Florida Power Corporation to install wooden utility poles adjacent to the aforesaid clay road and across the Plaintiffs' property.

17. That the construction and exist-

ence of this road and its continued use by the Defendants and their agents with no regard for the property rights of the Plaintiffs denies the Plaintiffs of the full use, benefit and enjoyment of their property and constitutes a nuisance and irreparable injury and damage to the Plaintiffs and their premises.

18. That the acts of the Defendants, L. M. Folsom and Pauline Folsom, his wife, indicate an entire wanton and reckless indifference and disregard for the property rights of others.

WHEREFORE, Plaintiffs pray that the Court issue its injunction ordering the Defendants to remove the road from Plaintiffs' property and to cease using same as a means of ingress and egress to their property, and that the Defendants be ordered to reimburse Plaintiffs for the costs of this suit and reasonable attorneys' fees incurred therein, and that the Court grant compensatory and

exemplary damages to the Plaintiffs and such other and further relief to the Plaintiffs as it deems proper, and Plaintiffs demand trial by jury of all issues so triable.

COUNT V

Plaintiffs reallege and reaffirm paragraphs 1 through 3 above and, in the alternative to Counts I, II, III and IV above, further allege:

19. That in the event the Court should find that a statutory way of necessity exists under Section 704.01(2), Florida Statutes, the Court hear evidence as to the most convenient, practical and equitable route for such a way of necessity over the land of the Plaintiffs and as to the amount to be paid to Plaintiffs for the taking of their property by such procedure including costs and Plaintiffs' attorneys' fees incurred herein.

WHEREFORE, in the event the Court

should decide that a statutory way of necessity should exist across the land of the Plaintiffs, Plaintiffs pray that the Court issue its decree establishing the most equitable, convenient and practical way of necessity across the land of the Plaintiffs, award compensation to the Plaintiffs for the taking of their land pursuant to Section 704.04, Florida Statutes, and that the Defendants be ordered to reimburse Plaintiffs for the costs of this suit and reasonable attorneys' fees incurred therein, and that the Court award such other and further relief to the Plaintiffs as it deems proper, and Plaintiffs demand trial by jury of all issues so triable.

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint has been furnished to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida, and to George E. Hovis, Esquire, Post Office Drawer 848, Clermont,

Florida, by mail this 17th day of October, 1974.

/s/ Jack B. Nichols
Jack B. Nichols, Esquire
Nichols & Tatich, P. A.
Suite 1110, Hartford Bldg.
200 East Robinson Street
Orlando, Florida 32802

Attorneys for Plaintiffs

CHAIN OF TITLE

This exhibit is voluminous and irrelevant to the issues before this Court, and has therefore been omitted.

EXHIBIT A

October 29, 1973

John H. Rhodes, Jr.
Attorney at Law
535 South Dillard Street
Winter Garden, Florida

Please reply to Orlando address

Re: Scudder and Folsom

Dear John:

I have your letter of October 24, 1973, in which you briefly outlined your various telephone conversations concerning the dispute between our respective clients which occurred subsequent to your client's beginning to use our client's property for access to his property.

Generally, I would agree that your letter sets forth our verbal communications to the effect that neither party would be giving up any of his legal rights as a result of our client's allowing Folsom to use our client's property to gain access to his property for a few days until such time as Mr. Folsom can prepare a road for access to his property from another direction.

EXHIBIT B

By this present concession on our client's part we do not intend to waive the right to bring suit if it appears necessary to do so.

I am somewhat concerned with the last paragraph of your letter, inasmuch as it was not my understanding that your letter would be for the purpose of shaping the areas in which litigation should be tried. Since this was not discussed or agreed to, I am sure you did not intend this to be included in the letter.

Please advise me as soon as possible as to the progress your client is making in obtaining access to his property from some other direction. Your prompt attention to this matter is appreciated.

Very truly yours,

Jack B. Nichols

JBN/glc

cc:Mr. Gilbert D. Scudder

EXHIBIT B

IN THE CIRCUIT COURT OF
LAKE COUNTY, FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

AMENDED COMPLAINT

Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by and through their undersigned attorneys, sue the Defendant, Florida Power Corporation, a Florida corporation, and allege the following:

1. That Gilbert D. Scudder and Irene J. Scudder, his wife, are residents of Campbell, New York, and own property in Lake County, Florida.

2. The Florida Power Corporation is a Florida corporation.

3. That this is an action for damages in excess of Two Thousand Five Hundred Dollars ($2,500.00) exclusive of interest and costs.

4. That the Plaintiffs are, and at all time herein material to this Complaint were, the owners and were entitled to possession of the following described property together with improvements thereon located in Lake County, Florida, to-wit:

> The SW 1/4 of the NW 1/4 of Section 12, Township 23 South, Range 23 East, of Tallahassee Meridian; and
>
> The West 1/2 of the SW 1/4 of Section 12, Township 23 South, Range 23 East, of Tallahassee Meridian.

5. That the Plaintiffs are entitled to relief against the Defendant upon the following counts:

COUNT I

Plaintiffs reaffirm, reallege, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and further

allege:

6. That this is an action in ejectment to recover real property in Lake County, Florida.

7. That Defendant has caused its utility poles to be placed upon the real property hereinbefore described and is therefore in possession of said real property to which Plaintiffs claim title as shown by the attached statement of Plaintiffs' chain of title.

8. That Defendant refuses to deliver possession of said property to Plaintiffs or pay them the profits thereof.

WHEREFORE, Plaintiffs demand judgment for possession of said property, costs of this action, and damages against Defendant with interest thereon.

COUNT II

Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and in the

alternative to Count I above, further allege:

9. That this is an action for trespass.

10. That on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees then and there acting within the scope of their employment and in the performance of the duties duly assigned to them by said Defendant, did willfully and intentionally enter upon the Plaintiffs' property without the consent or permission of the Plaintiffs, and with no regard for their property rights, and further without color of title to any easement across said property and with no investigation thereof, and did install thereon wooden utility poles across Plaintiffs' property for the financial benefit and profit of the Defendant at the expense of, and with damage to, the Plaintiffs.

11. That the Defendants' installation and maintenance of the aforesaid utility poles upon the Plaintiffs' property denies the Plaintiffs the full use, benefit and enjoyment of their property and constitutes a trespass directly and proximately resulting in damages to the Plaintiffs and their premises.

12. That the Defendant has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, and therefore knew or should have known that rightful and lawful entry onto the property of another and the erection of utility poles thereon must be pursuant to proper legal authority or pursuant to authority granted by the owner of the property in question.

13. That notwithstanding said knowledge, Defendant, with willful and wanton disregard for the property rights of the Plaintiffs, and for the financial benefit

of the Defendant, failed to obtain, or to make any reasonable effort to obtain, authority from the Plaintiffs or their authorized representative to enter onto the property of the Plaintiffs or to place utility poles thereon; failed to secure, or make any reasonable effort to secure, an easement in the property of the Plaintiffs; failed to institute or make any reasonable effort to institute, proper eminent domain proceedings with respect to any portion of the property of the Plaintiffs; and furthermore, with willful, wanton and reckless disregard for the rights of others, including the Plaintiffs, failed to discover, or make any reasonable effort to discover, the owner of the property in question upon which Defendant entered and erected its utility poles.

14. That the acts of the Defendant indicate an entire, wanton and reckless disregard for the property rights of the

Plaintiffs.

15. As a direct and proximate result of the above described wanton, reckless and wrongful acts of the Defendant, the Plaintiffs' property has been physically damaged; the most valuable portion of the tract, that along the edge of the lake, has been severed from the remainder, thereby decreasing the value of the whole parcel, and the ability to consummate a sale of the Plaintiffs' property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition for its full value before said trespass; the Plaintiffs have incurred other costs in this action.

WHEREFORE, Plaintiffs pray that the Court grant compensatory and exemplary damages to the Plaintiffs, and order that the Defendant reimburse Plaintiffs for

the costs of this suit; and that the Court grant such other and further relief to the Plaintiffs as it deems proper.

COUNT III

Plaintiffs reaffirm, reallege, reiterate and readopt paragraphs 1 through 5 of this Amended Complaint and in the alternative to Count I and Count II above, further allege:

16. That the Defendant has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, and therefore knew or should have known that rightfull and lawful entry onto the property of another and the erection of utility poles thereon must be pursuant to proper eminent domain proceedings or pursuant to authority granted by the owner of the property in question.

17. That notwithstanding said knowledge, Defendant, with willful and wanton

disregard for the property rights of the Plaintiffs, and for the financial benefit of the Defendant, failed to obtain, or to make any reasonable effort to obtain, authority from the Plaintiffs or their authorized representative to enter onto the property of the Plaintiffs or to place utility poles thereon; failed to secure, or make any reasonable effort to secure, an easement in the property of the Plaintiffs; failed to institute, or make any reasonable effort to institute, proper eminent domain proceedings with respect to any portion of the property of the Plaintiffs; and furthermore, with willful, wanton and reckless disregard for the rights of others, failed to discover, or make any reasonable effort to discover, the owner of the property in question upon which Defendant entered and erected its utility poles.

18. That on or about the 3rd day of November, 1973, the Defendant, by and

through its respective agents, servants and employees then and there acting within the scope of their employment and in the performance of the duties duly assigned to them by said Defendant, did willfully and intentionally enter upon the Plaintiff's property without the consent or permission of the Plaintiffs, and with no regard for their property rights, and further without color of title to any easement across said property and with no investigation thereof, and did install thereon wooden utility poles across Plaintiffs' property for the financial benefit and profit of the Defendants at the expense of, and with damage to, the Plaintiffs.

19. As a direct and proximate result of the above described wanton, reckless and wrongful acts of the Defendant, the Plaintiffs' property has been physically damaged, the most valuable portion of the tract, that along the edge of the

lake, has been severed from the remainder, thereby decreasing the value of the whole parcel, and the ability to consummate a sale of the Plaintiffs' property at its previous market value has been rendered impossible, so that the Plaintiffs have suffered a loss as a result of their inability to utilize and/or sell the property in its damaged condition; the Plaintiffs have had to incur the expense of retaining the law firm of Nichols & Tatich, P. A., to prosecute this action, and have incurred other costs in this action.

20. That the aforesaid wanton, reckless and wrongful acts of the Defendant has deprived the Plaintiffs of their property without just compensation in violation of the laws and Constitution of the United States and of the State of Florida.

WHEREFORE, the Plaintiffs demand that the Defendant be ordered to compensate

them for the property of which they have been deprived, for the decrease in the market value of the remainder of their property with interest theron, for the costs of this action, and for reasonable attorneys' fees.

/s/ Jack B. Nichols
Jack B. Nichols, Esquire
Nichols & Tatich, P. A.
Suite 1110 Hartford Bldg.
200 East Robinson Street
Orlando, Florida 32802
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Complaint has been furnished by mail to C. Brent McCaghren, Esquire, of Winderweedle, Haines, Ward & Woodman, P. A., Post Office Box 880, Winter Park, Florida 32789, this 245h day of July, 1974.

/s/ Jack B. Nichols, Esq.

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR LAKE COUNTY FLORIDA

CASE NO. 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Defendants.

ANSWER TO AMENDED COMPLAINT

Come now the Defendants, L. M. FOLSOM and PAULINE FOLSOM, his wife, by and through their undersigned attorney, and for Answer to the Amended Complaint filed by the Plaintiffs herein, state:

1. That they admit the allegations contained in paragraph numbered 1 of the Amended Complaint.

2. That they admit the allegations contained in paragraph numbered 2 of the Amended Complaint.

3. That they admit the allegations

contained in paragraph numbered 3 of the Amended Complaint.

As to Count I, they reallege and reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive of the Amended Complaint.

4. That they admit the allegations contained in paragraph 4 of the Amended Complaint.

5.(a) That they admit that Plaintiffs are the owners of those portions of the tract of land described in paragraph 5a which were above the water level of Flat Lake as shown on the United States Government Survey of said lands. They are without knowledge of and uncertain of the ownership of those portions of the tract of land described in the paragraph 5a which were below the waters of Flat Lake according to the United States Government survey of said lands and therefore deny that the Plaintiffs are the owners of such portions of the described

tract of land.

5.(b) That they admit that between March 1, 1973, and October 18, 1973, they and their agents, servants and employees entered upon some portions of the property described in Count I of the Amended Complaint without the express consent of the Plaintiffs. They deny that they damaged said property. They deny that they did on or about the 22nd day of October, 1973, cut, tear down and remove the fencing and fence posts placed along the southern and western boundary of the said property without the Plaintiffs' consent; they deny that they constructed a permanent clay road across Plaintiff's property. They admit that they have used, and continue to use, an existing roadway across Plaintiff's property for ingress and egress to and from their property for private purposes. They deny that they use it for commercial purposes.

5.(c) That they deny the allegations

contained in paragraph 5d of the Amended Complaint.

5.(d) That they deny the allegations contained in paragraph 5d of the Amended Complaint.

6. That they deny the allegations contained in paragraph 6 of the Amended Complaint.

As to Count II, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive of the Amended Complaint.

7. That they admit the allegations contained in paragraph 7 of the Amended Complaint.

8. That they deny the allegations contained in paragraph 8 of the Amended Complaint.

9. That they deny the allegations contained in paragraph 9 of the Amended Complaint.

As to Count III, they reallege and reaffirm their answers to paragraphs num-

bered 1 to 3, inclusive, of the Amended Complaint.

10. That they admit the allegations contained in paragraph 10 of the Amended Complaint.

11. That they admit they have taken possession of a strip of land across the property described in Count I of the Plaintiffs' Amended Complaint for ingress and egress to and from their property for private purposes. They deny the remaining allegations in paragraph numbered 11.

12. That they deny the allegations contained in paragraph numbered 12 of the Amended Complaint.

As to Count IV, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive, of the Amended Complaint.

13. That they admit the allegations contained in paragraph 13 of the Amended Complaint.

14. That they admit the allegations

contained in paragraph 14 of the Amended Complaint.

15. That they deny the allegations contained in paragraph numbered 15, except that they admit they use a road across the property described in Count I of the Amended Complaint for ingress and egress to and from their property for private purposes.

16. That they deny the allegations contained in paragraph numbered 16; except they admit receipt of the letter referred to therein and an earlier letter from Attorney John Skolfield which advised them that the Plaintiffs objected to their ingress and egress over the property described in Count I of the Amended Complaint.

17. That they deny the allegations contained in paragraph numbered 17 of the Amended Complaint.

18. That they deny the allegations contained in paragraph numbered 18 of the

Amended Complaint.

As to Count V, they reallege and reaffirm their answers to paragraphs numbered 1 to 3, inclusive, of the Amended Complaint.

19. Paragraph numbered 19 of the Amended Complaint is contingent and does not contain allegations of fact.

As an affirmative defense, Defendants allege that their property, and the uses existing thereof, fit the definition of a statutory way of necessity in accordance with Section 704.02(2) Florida Statutes, under which circumstances the Defendants use of a strip of land over Plaintiffs' property for ingress and egress and for electric power and telephone lines is specifically declared not to be a trespass or subject to damages.

As a second affirmative defense, Defendants allege that they had and have a legal right to use the property of the Plaintiffs in the manner in which they

have used it by reason of a prescriptive right to an easement over said property.

COUNTERCLAIM

Come now the Counterclaimants, L. M. FOLSOM and PAULINE FOLSOM, his wife, by and through their undersigned attorneys, and for cause of action against the counter defendants, GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife, allege and state:

Count I

1. That this count is an action to enjoin interference with an implied easement under common law rules and the provisions of Section 704.01(1), Florida Statutes.

2. The Counter Plaintiffs are the owners of, and reside upon a parcel of real property located in Lake County, Florida, more particularly described as follows:

> The East half of the Southeast quarter of Section 11, Township 23 South, Range 26 East.

3. The Counter Defendants are the owners of a parcel of real property located in Lake County, Florida, more particularly described as follows:

> The Southwest quarter of the Northwest quarter and the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East.

4. The South two-thirds of the Counter Defendants' western boundary line adjoins and is in common with the Counter Plaintiffs' eastern boundary line.

5. The easterly portion of the Counter Defendants' southern boundary is bordered by a public road known as Clay Pit Road, and also known as Phil Peters Road, running East to State Road No. 545. The fee title of Clay Pit Road is owned by Lake County, Florida, in those areas pertinent to this action. The westerly portion of the Counter Defendants' southern boundary is bordered by, and is in, the waters of a lake known as Flat Lake. The entire southern boundary of the

Counter Plaintiffs' propety is bounded by, and is in the waters of Flat Lake. The ownership of all parties to this cause to the southern portions of the above described tracts which lie in the said Flat Lake would be subject to whatever rights the State of Florida or the County of Lake may have in submerged lands. On the East, North and West the lands of the parties to this cause are bounded by lands owned by persons or corporations not party to this action which lands have been mostly developed into citrus groves.

6. The Counter Plaintiffs and the Counter Defendants deraign their title through separate chains from a common grantor, one E. E. Edge, who owned both parcels from August 27, 1906, to November 3, 1909, when he sold the parcel presently owned by Counter Defendants to C. M. Clayton, Counter Defendants; predecessors in title through meane conveyances. On March 31, 1914, he sold the North one-half

of the parcel presently owned by Counter Plaintiffs to Edge Realty Company, Counter Plaintiffs' predecessor in title through meane conveyances. A complete deraignment of Counter Plaintiffs' title is attached hereto made a part hereof by reference and marked Exhibit "A".

7. The only practical access to Counter Plaintiffs' property from a public road is over the property of the Counter Defendants from Clay Pit Road. The only other access to Counter Plaintiffs' property from a public road is over the intervening properties of strangers to the Counter Plaintiffs' title. Access to the Counter Plaintiffs' property by land from a public road is necessary to the use and enjoyment of it for the purposes for which Counter Plaintiffs are using it, that is: residential purposes and raising of livestock.

8. At the time Counter Defendants acquired title to their property, before

and since. there has existed visible roads or trails over the property owned by Counter Defendants serving as access to the Counter Plaintiffs' property and properties lying to the North and West owned by other persons and these roads and trails have been used continuously for the purpose of ingress and egress by Counter Plaintiffs' predecessors in title for a period of more than twenty years. Over the years the exact location of these roads and trails has been moved about to accommodate the development of the Counter Defendants' property. The road used by the Counter Plaintiffs and their predecessors in title over the past 20 years has followed the lake shore of Flat Lake within 30 to 40 feet of the lake, but the lake shore has changed from time to time through the forces of nature and through human instrumentality.

9. The Counter Defendants know, or should have known, that the counter Plain-

tiffs and their predecessors in title have used a strip of land following the shoreline of Flat Lake for ingress and egress to their property from the time Counter Defendants acquired title to their property until the present day.

10. On or about October 22, 1973, the Counter Defendants erected fencing along their southern and western boundary lines, thereby effectively blocking access to the Counter Plaintiffs' property over the property of the Counter Defendants. (The fencing has been removed, but only as a temporary measure for the Counter Plaintiffs' convenience while the issues and rights between the parties are settled by agreement or by this action and the removal was intended as a waiver of any of Counter Defendants' rights.)

11. The Counter Plaintiffs do not have an adequate remedy at law.

WHEREFORE the Counter Plaintiffs pray:

1. That the Court determine and decree that the Counter Plaintiffs have an easement and way of necessity over the following described property, to-wit:

> The Southeast quarter of the Northwest quarter, and the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East, Lake County, Floirda;

the dominant tenement being the following described property, to-wit:

> The East half of the Southwest quarter of Section 11, Township 23 South, Range 26 East, Lake Count, Florid.

2. That the Court determine and decree the location, width and permissible use of such easement and way of necessity.

3. That the Court permanently enjoin and restrain the Counter Defendants from obstructing or closing such easement and way of necessity.

4. That the Court award the Counter Plaintiffs judgment for their costs incurred in this action.

COUNT II

Alternatively the Counter Plaintiffs allege:

1. That this is an action to establish private prescriptive rights on a parcel of land located in Lake County, Florida.

2. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 2 through 5, inclusive of Count I of this Counterclaim.

3. The Counter Plaintiffs acquired the ownership of, and went into full possession of, the property described in paragraph 2 of Count I of the Counterclaim on April 17, 1973, by virtue of a warranty deed from Chloe Brown, formerly Chloe Brandenburg, an unremarried widow, which is recorded in O.R. Book 503 at page 92 of the Public Records of Orange County, Florida. The said Chloe Brown, formerly Chloe Brandenburg, acquired the ownership of, and went into possession of, said pro-

perty by virtue of a warranty deed from Ausbin Brown (who soon thereafter married) dated April 24, 1952, and recorded May 3, 1952 in Deed Volume 324, page 531, of the Public Records of Lake County, Florida. The said Ausbin Brown acquired the ownership of, and went into possession of said property by virtue of a Warranty Deed from L. R. Briley and Pearl A. Briley, his wife, dated November 13, 1945, and recorded November 9, 1946, in Deed Volume 259, at page 27 of the Public Records of Orange County, Florida.

4. For a period of more than 20 years, the Counter Plaintiffs and their said predecessors in title have actually, continuously and uninterruptedly used a road or trail over the property of the Counter Defendants described in paragraph 3 of Count I of the Counterclaim for the purpose of ingress and egress from their property described in paragraph 2 of Count I of the Counterclaim to a public road.

The use by Counter Plaintiffs and their predecessors in title has been open notorious, visible and adverse under claim of right. This has been inconsistent with the use and enjoyment of the property owned by the Counter Defendants and their predecessors in title.

5. The use referred to in paragraph numbered 4 herein has not been a permissive use.

6. The said road or trail has been similarly used by other property owners in the area to the West and North of the Counter Plaintiffs' property and, in fact, the use extended across the Counter Plaintiffs' property.

7. The said road has traversed the property of the Counter Defendant on a path roughly parallel to the shoreline of Flat Lake and about 30 to 40 feet distant from said shoreline. Since the shoreline of Flat Lake has fluctuated over the years through natural causes and human instru-

mentality, the exact location of the road has varied accordingly.

8. The Counter Plaintiffs, and their predecessors in title since Ausbin Brown acquired title, have used their property for residential and for agricultural purposes, including the raising of citrus fruit and the raising of livestock. The neighboring properties during this period of time have been used exclusively for raising citrus fruit. The motor vehicles and equipment necessary for these uses have consistently used the said road across Counter Defendants' property to gain access to the public road and Flat Lake.

9. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 10 and 11 of Count I of this Counter Claim.

WHEREFORE, the Counterclaimants pray:

1. That they be adjudged the owners of an easement of way by prescription over

the following described real property of the Counter Defendant, to-wit:

> "A 15 foot strip of land the centerline of which is 40 feet from and parallel to the shoreline of Flat Lake from the West line of the West one-half of the Southwest quarter of Section 12, Township 23 South, Range 26 East, Lake County, Florida, to the North line of the right of way of Clay Pit Road."

2. That the said easement be adjudged to be appurtenant to the following described real property of the Counter Plaintiffs, to-wit:

> "The East one-half of the Southeast quarter of Section 11, Township 23 South, Range 26 East, Lake County, Florida."

3. That the Court award the Counter Plaintiffs judgment for their costs incurred in this action.

Count III

Alternatively, the Counter Plaintiffs allege:

1. That this Count is an action to establish and acquire a statutory right of way necessity under the provisions of Section 704.01(2), Florida Statutes.

2. The Counter Plaintiffs reallege, reaffirm, reiterate and readopt paragraphs 2,3,4,5,7,8,10, and 11 of Count I of this Counter Claim.

3. The said properties of the Counter Plaintiff and the Counter Defendant lie outside the boundaries of any municipality.

4. The need of the Counter Plaintiff is to have a right of ingress and egress for motor vehicles and trucks, electric power and telephone lines.

5. The Counter Plaintiffs are willing and able to pay a reasonable sum of money for such an easement, provided they do not have a legal right to it as alternatively asserted in Count I and Count II of this Counterclaim.

WHEREFORE, the Counter Plaintiffs pray:

1. That the Court determine and decree that the Counter Plaintiffs have an easement and statutory way of neces-

sity for ingress and egress and for telephone and electric lines over the following described property, to-wit:

> "The Southeast quarter of the Northwest quarter and the West one-half of the Southeast quarter of Section 12, Township 23 South, Range 26 East, Lake County, Florida;"

the dominant tenement being the following described property, to-wit:

> "The East half of the Southeast quarter of Section 11, Township 23 South, Range 26 East, Lake County, Florida.

2. That the Court determine and decree the location, width and permissible use of such easement and statutory way of necessity.

3. That the Court determine the amount of compensation due the Counter Defendant for such easement.

4. That the Court permanently enjoin and restrain the Counter Defendant from obstructing or closing such easement and statutory way of necessity.

5. That the Court award the Coun-

ter Plaintiffs judgment for their costs ioncurred in this action.

John H. Rhodes, Jr.
535 South Dillard Street
Winter Garden, Florida

George E. Hovis
Post Office Drawer 848
Clermont, Florida

Attorneys for Defendant,
Counterclaimant

By: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to JACK B. NICHOLS, Suite 1110 Hartford Bldg., Orlando, Florida and BRENT McCAGHREN, Post Office Box 880, Winter Park, Florida, by U.S. mail this 12th day of December, 1974.

/s/ John H. Rhodes, Jr.
John H. Rhodes, Jr.
Attorney at Law

IN THE CIRCUIT COURT, IN
AND FOR LAKE COUNTY, FLORIDA

CIVIL ACTION NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

v.

L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

_____

DEFENDANT, FLORIDA POWER CORPORATION'S ANSWER TO SECOND AMENDED COMPLAINT

Defendant, FLORIDA POWER CORPORATION, by and through its undersigned attorneys, answers the Second Amended Complaint, and says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Defendant is without knowledge as to whether Plaintiff is the owner of the described property, but Defendant admits that it entered onto a portion of

the described property and placed utility poles on said property.

5. As to Count I, Defendant realleges and reaffirms its answers to paragraphs 1 through 5 of the Second Amended Complaint.

6. Paragraph 6 of Count I is admitted.

7. Defendant admits that it placed its utility poles upon the real property hereinbefore described, but denies that it is in possession of said real property to which Plaintiffs claim title.

8. Defendant denies paragraphs 8 of the Second Amended Complaint in that it denies it is in possession of said real property.

As to Count II, Defendant realleges and reaffirms its answers to paragraphs numbered 1 through 5, inclusive, of the Second Amended Complaint.

9. Defendant admits that this is an action for trespass.

10. Defendant admits that on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees, did install utility poles upon certain property described in the Complaint, but Defendant denies each and every remaining allegation contained in paragraph 10 of Plaintiff's Second Amended Complaint.

11. Paragraph 11 is denied.

12. Defendant admits that it has for many years engaged in the activity of erecting utility poles and securing easements or authority for such activity, but denies the remaining allegations of paragraph 12 of the Second Amended Complaint.

13. Paragraph 13 is denied.

14. Paragraph 14 is denied.

15. Paragraph 15 is denied.

As to Count III, Defendant realleges its answers to paragraphs 1 through 5 of the Second Amended Complaint.

16. Defendant admits that it has for many years been engaged in the activity of erecting utility poles and securing easements or authority for such activity, but denies the remainder of the allegations contained in paragraph 16 of the Second Amended Complaint.

17. Paragraph 17 is denied.

18. Defendant admits that on or about the 3rd day of November, 1973, the Defendant, by and through its respective agents, servants and employees, did install wooden utility poles across certain property described in the Second Amended Complaint, but denies all other allegations contained in paragraph 18 of the Second Amended Complaint.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

AFFIRMATIVE DEFENSES

As affirmative defenses, Defendant says:

21. That it placed such utility

poles upon said property described in the Second Amended Complaint at the request, direction and for the benefit of Defendants, L. M. FOLSOM and PAULINE FOLSOM.

22. Defendant, FLORIDA POWER CORPORATION, placed said utility poles within an area which Defendants, L. M. FOLSOM and PAULINE FOLSOM, have a legal right to use by reason of a prescriptive right to an easement over said property.

23. Defendant, FLORIDA POWER CORPORATION, erected said utility poles over property which Defendants, L. M. FOLSOM and PAULINE FOLSOM, enjoy a statutory way of necessity, pursuant to Florida Statutes §704.02(2), therefore, Defendant, FLORIDA POWER CORPORATION'S, act of placing said poles is by statute not a trespass or an action subject to damages.

24. Defendant, FLORIDA POWER CORPORATION, entered onto said property and placed utility poles on said property with the consent of the Plaintiffs, GILBERT D.

SCUDDER and IRENE J. SCUDDER.

25. Defendant, FLORIDA POWER CORPORATION, placed utility poles onto said property for the sole purpose of providing utility service to Defendants, L. M. FOLSOM and PAULINE FOLSOM, and such placement of the utility poles was not intended to benefit, nor does it in fact benefit, any person or persons other than said Defendants, L. M. FOLSOM and PAULINE FOLSOM.

CROSSCLAIM

Defendant, FLORIDA POWER CORPORATION, by and through its undersigned attorneys, and pursuant to Florida Rule of Civil Procedure 1.170, brings this Crossclaim against Defendants, L. M. FOLSOM and PAULINE FOLSOM, his wife, and allege:

26. This Crossclaim arises out of the same transaction or occurrence that is the subject matter of the original action in this case.

27. Crossclaimant, FLORIDA POWER CORPORATION, erected the utility poles at the request and direction of Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM.

28. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, represented to Crossclaimant, FLORIDA POWER CORPORATION, that Crossdefendants had an easement over said property to install and erect utility poles.

29. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, at no time indicated to Crossclaimant, FLORIDA POWER CORPORATION, that Crossdefendants might not have an easement or other right to have utility poles installed over said property.

30. Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, are or may be liable to the Crossclaimant, FLORIDA POWER CORPORATION, for all or part of the claim asserted by Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER, in the action against the Crossclaimant, FLORIDA

POWER CORPORATION.

WHEREFORE, Crossclaimant, FLORIDA POWER CORPOATION, demands indemnification from Crossdefendants, L. M. FOLSOM and PAULINE FOLSOM, for any damages found to be owing from Crossclaimant, FLORIDA POWER CORPORATION, to the Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER.

I HEREBY CERTIFY that copies of the above and foregoing have been furnished to JERRY H. JEFFERY, ESQUIRE, of NICHOLS & TATICH, P. A., Suite 1110, The Hartford Building, 200 East Robinson Street, Orlando, Florida, 32801, Attorneys for Plaintiffs, and to JOHN H. RHODES, JR., 535 South Dillard Street, Winter Garden, Florida, 32787, Attorney for Defendants, L. M. FOLSOM and PAULINE FOLSOM, by U.S. Mail this 26th day of March, 1975.

JAMES L. FLY, ESQUIRE
WINDERWEEDLE, HAINES, WARD & WOODMAN, P. A.
Post Office Box 880
Winter Park, Florida 32789
Attorneys for Defendant/Crossclaimant, FLORIDA POWER CORPORATION

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66; 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation, and
L. M. FOLSOM and PAULINE
FOLSOM, his wife,

Defendants.

FINAL JUDGMENT

This cause came on for hearing before the Court for judgment upon all issues raised by the pleadings, the parties having waived trial by jury during the proceedings.

Plaintiffs, Gilbert D. Scudder and his wife, Irene J. Scudder (the latter being deceased at the time of the final hearing), sued Defendants, Florida Power Corporation and L. M. Folsom and wife, Pauline Folsom, in separate causes of

action which were consolidated for trial. Plaintiffs demanded judgment for ejectment of the defendants, compensatory and punitive damages for trespass and, in the alternative, as an affirmative defense to a counterclaim, damages for inverse condemnation resulting from the construction of a clay road and power line over plaintiffs' property.

In defense, defendants alleged as a counterclaim that the right of way over plaintiff's property (1) was established by a prescription, (2) constituted a common law right of way of necessity, or (3) was a statutory way of necessity.

The evidence in this case established the location of the various parcels of property and improvements as shown on the map attached and made a part of this judgment.

In April of 1973, the defendants Folsom entered into a contract to buy Parcel "B". They promptly proceeded to

construct a clay road over Parcel "A", plaintiffs' property, from their land to Phil peters Road (shown on the map between (1) and (2). About the same time the road was constructed, the Folsoms applied to Florida Power Corporation for electric service to their property. At the time of the application Florida Power maintained an electric distribution line approximately one mile east on Phil Peters Road serviced by its Winter Garden division, and lines to the northwest of the Folsom property (shown from points (6) to (6) on the map attached) serv[illegible]ed by its Clermont division.

Initially, attempts were made to secure the necessary right-of-way for service from the northwest. Consent from the affected property owners was not obtained and the application was referred to the Winter Garden division.[1]

When the initial application was made by the Folsoms, the field representa-

tive of Florida Power Corporation made a rough sketch of the design of the power line from Phil Peters Road locating the Defendants' property at the western terminus of the road. At that point the new line to be constructed would run north approximately 2000 feet and west approximately 1000 feet. This initial design was projected in subsequent designs made by the Engineering Department of Florida Power.[2] Easements were obtained from the Defendant Folsom upon his property, but not upon the plaintiffs' lands.

In the latter part of 1973 a work order was issued by Florida Power for the construction of the line according to the

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(1) Testimony revealed that a concerted effort to obtain a right of way from the northwest was not made by Florida Power and that such an easement might have been reasonably obtained.

(2) This was a mistake that could have been readily observed and corrected by an inspection of the property, viewing of aerial photographs and an examination of the public records of Lake County.

erroneous plan. When the construction crew arrived at the terminus of Phil Peters Road with Flat Lake they discovered the error in the engineering design and proceeded to alter the construction by placing three poles with lines traversing the shoreline of Flat Lake on the south side of the recently constructed clay road running through the plaintiffs' property. The evidence in this case was inconclusive as to the location of the first pole at the junction of Phil Peters Road with the south end of the clay road, but conclusive that the second and third poles were, in fact, located on the plaintiffs' property.

Plaintiffs, residents of the State of New York, upon being informed of the road and power line promptly filed this suit.

The evidence in this case further reveals that the defendant Folsom's predecessor in title, Ausbin Brown, had

lived on Parcel "B" from 1949 until his death in 1958. In 1952 he convened the title of this property to Chloe Brandenberg, whom he later married, and they constructed a home on the land which they occupied until his death in January of 1958. Mrs. Brown testified that from 1952 through 1958 she and her husband used the same route upon which the Folsoms constructed the clay road as a means of ingress and egress to her home. Others testified that during the period as early as 1948 up to the present time they had been using various routes over plaintiffs' property for agricultural vehicles in servicing the groves lying to the north and west of the Folsom property.

When Ausbin Brown died in 1958 his wife moved to Winter Garden and the Brown property remained unoccupied until its sale in 1973 to the Folsoms. For several years after Ausbin Brown's death Mrs. Brown permitted friends to use the home

as a composite and recreational area and they used a similar route of ingress and egress to the property over the plaintiffs' land. Some years later during the 1960's the Brown house was destroyed and the Brown property was not used for any purpose until improved by the Folsoms at the time of their contract to purchase in April, 1973.

Plaintiffs acquired title to Parcel "A" in 1957 and proceeded to develop an existing young citrus grove, which had been planted on said property, apparently without any knowledge of any adverse claims to a right of way over their property by Ausbin or Chloe Brown. Mr. Scudder testified that he knew of the house on the property but was unaware of any necessity or use of his land for ingress or egress to the Brown property. he permitted, as an accommodation to other grove owners in the area, ingress and egress over various routes of his

property solely for the harvesting and cultivation of citrus crops.

The claim of the defendants of an easement by prescription is not supported by the evidence, and the Court finds that no such estate has been established by the defendants Folsom or their predecessor in title.

Easement by prescription had its origin in the common law of England, the original theory being that the right claimed must have been enjoyed beyond the period of the memory of man. The evolution of this presumption of a grant resulted in the common law rule of 20 years of continuous and uninterrupted use which prevails in our state. Zetrouer v. Zetrouer, 103 So. 625 (Fla. 1925).

Because prescriptive rights inflict corresponding losses or forfeitures of the rights of other persons, they have not been favored in the law. Creation of the estate arises only by an adverse use

of the privilege with the knowledge of the person against whom it is claimed or by use so open, notorious, visible and uninterrupted that knowledge will be presumed and exercised under a valid claim of right adverse to the owner, and acquiesed in by him; and such adverse use must exist for a period equal, at least, to that described by the Statute of Limitations for acquiring title to land by adverse possession. J. C. Vereen & Sons v. Houser, 167 So. 45 (Fla. 1936).

Corresponding to these requirements, the Supreme Court of Florida in Vereen adopted these further considerations:

1. If the user not be exclusive, and not inconsistent with the rights of the owner of the land, its use and enjoyment, the presumption is that such user is permissive rather than adverse.

2. No easement can be acquired when the use is by express or

implied permission.

3. Always considered is whether the user is against the interest of the parties suffering it or injurious to him. There must be an invasion of the parties' right, for unless one loses something the other gains nothing.

4. The presumption of grant can never arise when all the circumstances are perfectly consistent with the non-existence of a grant.

5. To establish a right by prescription it is necessary to prove three things: (1) the continued and uninterrupted use or enjoyment of the rights for the full period of twenty years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was adverse, or under claim of right.

6. When the claimant enjoys an easement openly, notoriously, con-

tinuously and uninterruptedly in derogation of another's rights for the full period of twenty years, the use will be presumed to have been adverse so as to pass upon the servient estate the burden of rebutting the presumption.

7. The rule in paragraph 6 above does not apply where claimant's own testimony shows that the use was permissive in its inception.

8. When proof is not clear and positive of adverse possession and occupation of land for the full statutory period, no title by adverse possession can be adjudged.

The Florida Supreme Court recently spoke to the point of adverse use. In Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974) the Court stated that use of the land by the party claiming the easement must be exclusive and inconsistent with the rights of the owner to its use

and enjoyment, or it would be presumed that such use is permissive rather than adverse, and will never ripen into an easement.

Applying these considerations to the case sub judice based upon all evidence before the Court, defendant's claim of easement by prescription utterly fails.

The defendants' claim for a common law easement under Section 704.01(1), Florida Statutes, was founded upon evidence that in 1906 the north 40 acres of Parcel "B" and the south 80 acres of Parcel "A" was titled in a common owner, E. E. Edge. In 1909 Edge conveyed the north 40 acres of Parcel "B", and subsequently in 1914 and 1917 conveyed the south 80 acres of Parcel "A" in 40 acre lots. At no time was there a common owner of all Parcel "B" and the plaintiffs' property through which the common law easement was sought. Furthermore, there was no evidence that Phil Peters

Road existed in 1906 or even as late as 1920.

Common law easements have their origins in the law from an implied grant of ingress and egress originating from a common owner. The common law rule of an implied grant of a way of necessity is specifically recognized in Florida Statutes, Section 704.01(1), which provides that such an implied grant exists when a person is granted lands to which there is no accessible right-of-way except over the land of the grantor, provided there is unity of title from a common source other than the original grant from the State or the United States. See also Hunt v. Smith, 137 So. 2d 232 (Fla. App. 1962). The common law way of necessity contemplated a common source of title between the dominant and servient tenaments. Stein v. Darby, 126 So. 2d 313 (Fla. App. 1961). At no time was E. E. Edge the common owner of all of Parcel

"B" and the plaintiffs' property through which the common-law easement was sought.

Furthermore, the conveyances by E. E. Edge did not land-lock the Defendants Folsom. In Hanna v. Means, 319 So. 2d 61 (Fla. App. 1975) the Second District Court of Appeal discussed the requirement of "common source" as contemplated in Florida Statutes, Section 704.01(1):

> The "common source" which forms the basis for a common-law way of necessity is not one who originally may have owned all the involved lands; the "common source" within contemplation of the rule must be shown to be he who created the situation which ultimately resulted in the land-locked parcel.

In Reyes v. Perez, 284 So. 2d 493 (Fla. App. 1973) the Fourth District Court of Appeal ruled that "the common-law easement comes into being by implication at the very time the grantor conveys a parcel which is inaccessible except over such grantor's lands." In the case sub judice the defendants' contention that the test of common source is met in E. E. Edge is

untenable. Accordingly, the Court concludes that a common-law easement as provided for under Section 704.01(1), Florida Statutes, does not exist upon the plaintiffs' property.

The third contention by the defendants was that a statutory way of necessity existed over the clay road from the defendants Folsom property to Phil Peters Road along the edge of Flat Lake pursuant to Section 704.01(2).

The Court finds that the property of the Folsoms was outside any municipality, was used as a dwelling and for stock raising purposes and that the Folsom land was shut off by lands, fencing or other improvements so that no practicable route of egress or ingress was available to the nearest public or private road.

Based upon the evidence submitted as to the practicability of this route as opposed to any others, the Court determined that a statutory right of necessity

existed over the plaintiffs' land to the extent of 30 feet along the road right-of-way established and improved by the defendants Folsom.

The Court further concludes that the defendant Florida Power Corporation did at the time of its power line construction trespass upon the lands of the plaintiff, that the location of the power poles upon plaintiffs' land were not reasonably located in relation to the newly constructed road to be within the bounds of any contemplated statutory way of necessity, and that the right-of-way of the defendants Folsom for an easement for ingress and egress, electricity and telephone service over and upon the lands of the plaintiffs should be located within the 30-foot statutory way of necessity. The Court considers such 30-foot easement sufficient for the construction of the power line and guide wires within a 15 foot area and also the road right-of-way

which does not exceed 15 feet.

According to Florida Statutes, Section 704.01(2), the easement granted herein may be maintained for persons, vehicles, stock and electricity and telephone service upon the plaintiff's land. The use of said property does not constitute a trespass provided the easement is used only in an orderly and proper manner.

As the power distribution poles were placed well outside the 30-foot right-of-way and have no logical relationship to the clay road, the Court finds from the evidence that the Defendant Florida Power Corporation did not use said easement in an orderly and proper manner and that the Defendant Florida Power Corporation did in fact trespass upon the property of the plaintiff when it installed said poles and line and said trespass continued until the trial of this cause.

Furthermore, the Court finds from the evidence that the trespass committed

by the defendant Florida Power Corporation was wilful, intentional, and with reckless indifference to the property rights of the Plaintiffs. The evidence before this Court revealed that Florida Power Corporation followed a policy when installing distribution lines which gave little or no concern to the property rights of landowners. In implementing this policy, the Defendant, through the testimony of its engineer, admitted that the company was taking certain risks at the expense of property owners in placing its distribution lines and poles on property without first obtaining a survey or viewing the public maps prior to installing such lines. Nevertheless, the Defendant Florida Power Corporation elected to take its chances in pursuing this policy at the expense of property owners affected, such as the Plaintiffs.

The unrefuted evidence showed that Florida Power Corporation has secured

rights of way from property owners for the construction of its power lines for many years. It knew the proper procedure for checking the public records to determine the legal owners of the lands its proposed lines would affect. It knew that surveying the exact location of its lines and poles on the property affected eliminated the risk of error in constructing the distribution line. It recognized the need to make personal contact with the property owners affected by its plans prior to the installation of its lines and poles. The evidence demonstrated that it was the policy of Florida Power Corporation to do these things prior to installing transmission lines. But in the instant case the Defendant Florida Power Corporation did none of these things in installing those distribution lines to the Folsom property, and instead elected to install a mile of line and poles along Phil Peters Road by "eyeballing"

an imaginary line along the side of the road and further installing approximately one-quarter of a mile of line and poles upon the Plaintiffs' property when the physical layout of the road, lake and land clearly revealed the engineering sketch previously prepared by the Defendant Florida Power Corporation was in error. No single employee of Florida Power Corporation apparently would admit he had made a mistake and instead the cause of the error was blamed on the policy of Florida Power Corporation for installing distribution lines to provide power to its customers.

The evidence thus reveals a policy of the Defendant Florida Power Corporation that was so careless and unconcerned with the rights of property owners that it would proceed to establish a distribution line in the face of a series of facts that no right of way in fact existed for the placement of the distribution poles.

The policy followed by the Defendant Florida Power Corporation in this case greatly endangers the rights of property owners in this state and is clearly against the public interest. The Court recognizes that punitive damages are awarded for the purpose of penalizing a defendant who acted in gross disregard of the rights of the Plaintiff and to deter such future conduct. Richards Co., Inc. v. Harrison, 262 So. 2d 258 (Fla. App. 1972). Punitive damages are therefore proper in this case, as the Defendant Florida Power Corporation has wilfully abused the rights of the Plaintiffs. An award of punitive damages is also proper in the instant case to deter the Defendant from continuing its careless procedures. As the Defendant is a multi-million dollar corporation, only a large award could successfully punish the Defendant and deter its conduct in the future. However, this Court feels constrained by recent

appellate decisions to limit the amount of exemplary damages in relation to the actual damages suffered. Canty v. Wackenhut Corp., 311 So. 2d 808 (Fla. App. 1975); Lan-Chile Airlines, Inc. v. Rodriguez, 296 So. 2d 498 (Fla. App. 1974); Air Line Employees Association International v. Turner, 291 So. 2d 670 (Fla. App. 1974). As the evidence indicates Plaintiff's damages to their property as a result of the placement of the distribution poles by the Defendant was not significant, the Court is accordingly restrained in its award of exemplary damages to $25,000.00, although this Court is not necessarily convinced this amount of damages will deter the future conduct of the Defendant in following the aforementioned policy.

Based upon the foregoing facts and conclusions of the Court on the evidence submitted to the Court, it is

ORDERED and ADJUDGED as follows:

1. The defendants L. M. Folsom and

Pauline Folsom have a statutory way of necessity, exclusive of common law right, over and upon the lands of the plaintiff Scudder, not to exceed 30 feet in width, traversing the shore of Flat Lake from the east boundary of the Southeast quarter (SE¼) of Southeast quarter (SE¼) of Section 11, to the northerly right-of-way line of Phil Peters Road through and to the South boundary of the Southwest quarter (SE¼) and Southwest quarter (SW¼) of Section 12, all in Township 23 South, Range 26 East, the established location thereof being the north boundary of the existing clay surfaced road through plaintiffs' property approximately 1540 feet in length that area lying sough thereof for a distance of 30 feet perpendicular to said north line, subject to the location within said right-of-way of the pump shed owned by the plaintiff Scudder, such easement to be temporary and to exist so long as the same shall be

reasonably necessary for ingress and egress by persons, vehicles, stock and electricity and telephone service thereon; provided that such easement shall be determined to exist from date of payment of the sums hereafter provided in paragraph 2 to be paid by the defendant Folsom to plaintiff Scudder.

2. As just compensation for the use of said easement the plaintiff, Scudder, shall have and recover of and from the defendant Folsom the sum of $7,400.00, for which let execution issue.

3. That the plaintiff, Scudder, have and recover of and from the defendant Florida Power Corporation the sum of $500.00 in compensatory damages and the sum of $25,000.00 in punitive damages, for which let execution issue.

4. That the defendant Florida Power Corporation shall forthwith move its poles and lines upon the plaintiffs' property to within the area of the ease-

ment described above.

5. The Court reserves jurisdiction of the parties hereto and the subject matter hereof for the purpose of assessing costs and entering judgment thereon against the respective parties upon presentation of evidence of costs.

6. The cross-claim of defendant Florida Power Corporation for indemnity by the defendant Folsom is denied.

DONE and ORDERED in Chambers at Tavares, Lake County, Florida, this 14th day of April, 1976.

/s/ Wallace E. Sturgis, Jr.
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Final Judgment have been furnished to Jack B. Nichols, Attorney for Plaintiffs, P. O. Drawer 33, Orlando, Florida 32802; John H. Rhodes, Attorney for Defendants, 535 S. Dillard Street, Winter Garden, Florida 32787; George E.

Hovis, Esquire, P. O. Drawer 848, Clermont, Florida 32711; and C. Brent McCaghren, Attorney for Florida Power Corporation, P. O. Box 880, Winter Park, Florida 32789 by U. S. Mail this 14th day of April 1976.

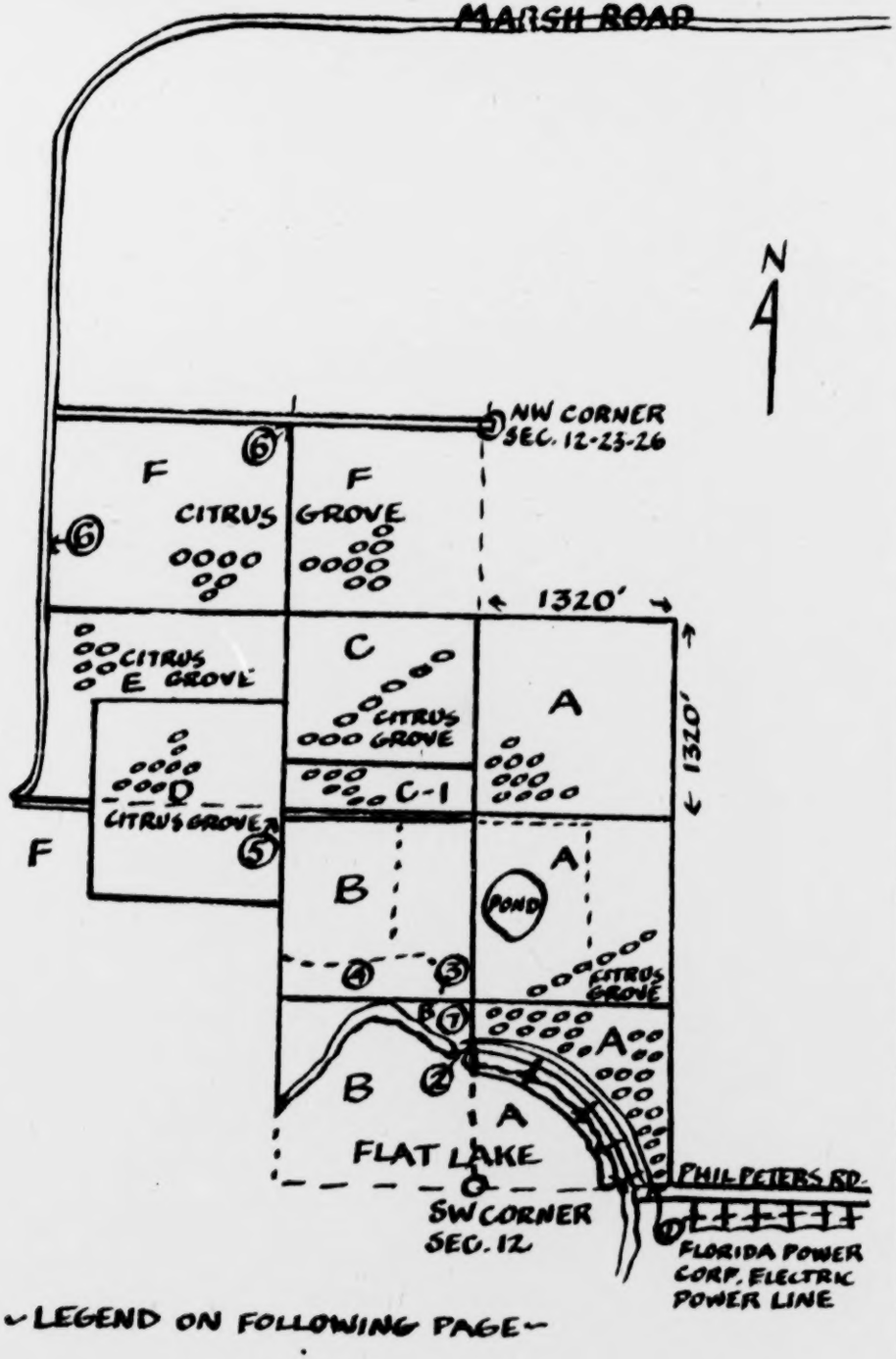
/s/ Mary Alexander
Secretary

STATE OF FLORIDA, COUNTY OF LAKE

I HEREBY CERTIFY, that the above and foregoing is a true copy of the original filed in this office,
JAMES C. WATKINS, Clerk,
Circuit Court

By /s/ Linda James Deputy Clerk

Dated 6-10-76



~LEGEND ON FOLLOWING PAGE~

Reference

Parcel

A- Gilbert Scudder Grove
W½ of SW¼ and SW¼ of NW¼
S12, T23S, R26E

B- L. M. Folsom Property
E½ of SE¼, S11, T23S, R26E

C- Cappleman Property (30 acres)
C-1- S 10 acres owned by Crawford
SE¼ of NE¼, T28S, R26E

D- Britt Grove

E- Britt-Tilden Grove

F- Southern Fruit Co. Properties

Points

1- Eastern terminus of 30 foot right-of-way of necessity
2- Western terminus of 30 foot right-of-way of necessity and west boundary of Scudder Grove property and east boundary of Folsom property
3- Folsom house
4- Folsom barn
5- West boundary of Folsom property and end of clay road
6- Location of power line on Southern Fruit Property
7- Location of Brown house in 1967.

-ure Mr. Nichols is purporting to represent.

THE COURT: Well, in all candor, the Court would say that the situation is so analogous to condemnation that I'm sure that - - or, I feel, that the statute violates the due processes of the plaintiff in this case to claim an allowance of attorney's fees. But that is not within, to me, the purview of judicial remedy, but legislative. Because the court has said in many, many decisions that you can claim attorney's fees only

where the statute provides. The statute makes no reference

to the compensation in such cases to include attorney's fees and costs of litigation; but it is damages for the party that is entitled, for use of such easement.
And it is limited to that extent for the damages to erase.

MR. HOVIS: Well, you can go a step further, Judge, and recognize that we're really involving two issues here. We're involving the issue of the use of the easement, and we're also involving the possible

issue of trespass, which they're trying to get in now. If there is in fact a trespass, the damages for the trespass are

we did raise the Constitutional guarantee and we want to preserve the fact that to the extent that this is applied in that fashion, it would be violating our Constitutional rights to compensation for the taking of our land without due process for our clients.

MR. HOVIS: I can recognize his argument, Judge, but I would like to have it clarified that we're not talking about trespass now.

THE COURT: Well, - -

MR. HOVIS: We started off the questioning on trespass.

our law consistent with what Constitutional guarantees require, the courts have done this, I think the Supreme Court of Florida has done it just recently, is the comparative negligence laws that I'm sure the Court is well aware of. So I would submit - -

THE COURT: But that was the Supreme Court, not a circuit judge.

MR. NICHOLS: Well, I submit to the Court that you - - -

THE COURT: And you have some judges that are crusaders and some that aren't. You happened to get hold of one that is a very strong believer in follow-

-ing the law as it is written, not making new in-roads on the law and declaring law as constitutional or unconstitutional.

MR. NICHOLS: Well, I'm merely submitting, Your Honor, that you - - - -

THE COURT: I will let you proffer it, but I can tell you that if for the record you want to proffer the amount of attorney's fees and other costs involved, to him personally, involved in this, if you want to pre-

serve some record, be my guest. But I will not

consider it in the judgment of the Court.

MR. NICHOLS: Thank you, Your Honor.

DIRECT EXAMINATION ON PROFFER:

MR. NICHOLS:

Q. For the proffer, sir, would you please tell us the costs and expenses to which you have been put as a result of the attempt to preserve your property from this use to which it has been put by Florida Power?

A. I have expended in excess of twenty thousand dollars, for surveys, and travel expenses. Not hotel or motel or food.

MR. HOVIS: Your Honor,

I hate to object on a proffer, but I think if you're going to get into it property, then he's going to have to testify in detail as to how he spent this money, for what purpose. And if he gets into any testimony on attorney's fees, there must be some testimony as to if the attorney's fees were proper and that the attorney's fees were reasonable. Now, you know, if this is going to go up, let's go ahead and get it in properly.

MR. NICHOLS: Well, you haven't given him a chance to answer yet; maybe he's

prepared to do that.

THE COURT: Go ahead.

WITNESS: Those funds were expended prior to the start of this court proceedings last Monday a week ago.

DIRECT ON PROFFER CONTINUED:

MR. NICHOLS:

Q. Sir, do you have specific records as to the exact amounts that you have expended in those matters, and if so, what are they?

A. The appraisal by Mr. Duckworth, seventeen hundred and fifty dollars. Fees to Skofield, Nichols & Tatich, and Nichols and Tatich later,

fourteen thousand five hundred and seventy-seven dollars and ninety-five cents. Attor-

ney's fees for Henry Scudder, nine hundred and sixty dollars. And I had air traffic, airplane tickets and travel beginning on September 29th, 1973, the first trip; March 20th, '74, was the second; July 22nd, 1975, was the third; which amounted to three thousand twenty-one dollars and eighty-three cents.

Q. And that does not include your travel for coming here for this trial?

A. That's right.

Q. Or your motel?

A. That's right.

Q. And does that include any damages for the loss of time for your time for devoting this period of time that has been necessary in this case, from your business?

A. No, nothing for my time being away.

Q. Are any other factors included in that twenty-thousand some odd dollars figure that you previously mentioned?

A. No, just what I said.

Q. Do the attorney's fees that you

mentioned include costs, including depositions and other travel expenses?

A. Right.

Q. And to that extent, did you from time to time receive itemized statements as to services which were being rendered as they were being rendered?

A. Yes.

Q. What was the exact figure, sir?

A. Twenty thousand three hundred and nine dollars and seventy-eight cents.

MR. NICHOLS: Do you want to cross, Mr. Hovis?

MR. HOVIS: Are you through with the proffer?

MR. NICHOLS: I'm through

with the proffer, yes.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT
FRIDAY, OCTOBER 21, 1977

FLORIDA POWER CORPORATION,

Appellant,

v. CASE NO. 76-1005

GILBERT D. SCUDDER, L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellees.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Appellants,

v. CASE NO. 76-1036

GILBERT D. SCUDDER, et al.,

Appellees.

Counsel for appellees having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that said Petition be and the same is hereby denied.

A TRUE COPY
TEST:

/s/ William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: C. Brent McCaghren
Jack B. Nichols
John H. Rhodes, Jr.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66 & 74-67

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation, and
L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

FILED
JUL 21 9:54 AM '78
COUNTY CLERK AND ALSO
CLERK OF CIRCUIT COURT
LAKE COUNTY, TAVARES,
FLORIDA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gilbert D. Scudder, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Florida denying his Petition for Writ of Certiorari entered in this action on June 6, 1978. This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

PROOF OF SERVICE

I, JACK B. NICHOLS, of Nichols & Tatich, P. A., attorneys for Gilbert D. Scudder, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 20th day of July, 1978, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On FLORIDA POWER CORPORATION, L. M. FOLSOM and PAULINE FOLSOM, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To C. BRENT McCAGHREN, Esquire, Attorney for Florida Power Corporation, Post Office Box 880, Winter Park, Florida 32789;

To JOHN H. RHODES, JR., Esquire,

Attorney for L. M. Folsom and Pauline Folsom, 535 South Dillard Street, Winter Garden, Florida 32787.

/s/ Jack B. Nichols

JACK B. NICHOLS, Esq., of
NICHOLS & TATICH, P. A.
108 E. Hillcrest Street
Post Office Box 33
Orlando, Florida 32802
Telephone 305/841-8823
Attorneys for Plaintiff/
Appellant

IN THE CIRCUIT COURT IN
AND FOR LAKE COUNTY,
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and CASE NO. 74-77
IRENE J. SCUDDER, his wife,

vs. Plaintiffs,

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

O R D E R

This cause came before the Court upon Defendant FLORIDA POWER CORPORATION's Motion to Compel Election of Remedies, and the Court having heard arguments of counsel, considered the

pleadings, and being otherwise fully advised in these premises, it is thereupon

ORDERED AND ADJUDGED that the said Defendant's Motion to Compel Plaintiffs to Elect Remedies is hereby denied. It is further

ORDERED AND ADJUDGED that the Plaintiffs' Motion to Strike that portion of the addendum clause of Count III of Defendant FOLSOM's Counter-claim is hereby granted upon consent of Defendant Folsom's counsel. It is further

ORDERED AND ADJUDGED that this cause shall come on for trial without jury on all equitable issues commencing at 9:30 a.m. o'clock on December 18, 1975, and continuing for two days, if necessary.

The parties are further directed to enter into a Pre-Trial Stipulation on or before December 1, 1975, regarding only those matters which are to be sub-

mitted to the Court for determination at the aforesaid non-jury trial. If the result of the non-jury trial of December 18, 1975, requires a subsequent jury trial on the issue of damages the Court will schedule a trial at the time of the entry of an Order on said issues.

DONE and ORDERED this 28th day of October, 1975, at Tavares, Lake County, Florida.

_____
CIRCUIT JUDGE

Copies by mail to:

Jack B. Nichols, Esquire, P.O. Box 33, Orlando, Fla. 32802

C. Brent McCaghren, Esquire, P.O. Box 880, Winter Park, Florida 32789

John H. Rhodes, Jr., Esquire, 535 South Dillars, Winter Garden, Fla. 32787

them you are a witness in the case and that you are prohibited from discussing it or having anyone discuss it in your presence.

If they persist, I ask that you report this matter immediately to the bailiff and appropriate action will be taken by the Court.

Your violation of the rule will and can result in your not being permitted to testify in this case.

All right. Both of you will remain out of the Courtroom. You will be called as a witness at the appropriate time.

All right, Mr. Rhodes, if you would care to proceed.

MR. RHODES: Well, I'd like to take a few minutes to explain how I feel that the issues that we have in this case will break down. As you know there has been some discussion of this and I'm aware that the Court, of course, is fully aware of the various causes of action involved.

We will proceed at this point with the Counts contained in our Counter Claim which involve assertion of a prescriptive right; the assertion of a common law easement; the assertion of a statutory way of necessity. The evidence on all of these subjects solicited from the

witnesses will be somewhat intermingled particularly as much as some of the same facts can get involved with each point.

We will submit to the Court, in considerable detail, the subject of prescriptive right would indicate the use of a particular area of Mr. Scudder's property for ingress and egress. We will not be submitting significant evidence of the use of this area for electrical power inasmuch as the electrical power did not come into this picture until on or shortly before, within a matter of days or weeks where the Plaintiff erected a fence which, according to our agreement fixed whatever rights existed at that time, in 1973.

THE COURT: I think your stipulation included the fact that some several months prior to that time, the poles were placed on the property.

MR. RHODES: I'm not exactly sure of the exact time, your Honor, but it was not sufficient to establish a use of that nature, therefore, it appears that the question of power will not come into prescriptive issue unless the law supports the idea that it follows with the ingress and egress use and I'm not sure that that is the law, but we'll get into that a little bit later, but only under those

circumstances.

In other words, under a legal basis rather than a factual basis should the issue be decided on a question of prescriptive rights.

If we are successful in maintaining our position for prescriptive right as to ingress and egress, it is my understanding and thinking that such ruling would, at that point, eliminate the necessity of a jury trial.

THE COURT: It depends upon, does it not, Mr. Rhodes, upon whether or not a prescriptive right for ingress and egress carries with it the same right as the power line.

MR. RHODES: That is what I was going to say, Your Honor. We may, however, be confronted with the necessity of a jury trial on the question

of a power line as distinguished from ingress and egress itself.

I was under the impression that the matter of common law easements would be primarily a legal determination, but Mr. Nichols and I just had a discussion which leaves some doubt on that subject and I guess that I, at this time, had better make no comment and see how that develops.

And then, of course, finally, the statutory way

of necessity in the event that there are no prescriptive rights and, if all of these are unsuccessful, it's been my understanding we would be in a jury trial with the question of the trespass for damages.

I simply wanted to state where I think I'm going before I start going, your Honor, and that's the extent of my opening.

MR. McCAGHREN: Your Honor, Florida Power, to some extent, is going with Mr. Rhodes, and I don't mean that as a pun.

What our position is, your Honor, we feel that the evidence presented will show that, for some twenty some years, that the route along

like Flat Lake crossing Mr. Scudder's property was used as means for ingress and egress to the property owners, that is to a Mr. and Mrs. Osborne Brown and to some of their successors and interests, and that route was also used by property owners lying to the north and to the west to get to and from their groves and that that use continued continuously from the late forties, early fifties on into the present time.

It's further our position that the evidence

IN THE CIRCUIT COURT,
IN AND FOR LAKE COUNTY.
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs -

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and CASE NO. 74-67
IRENE J. SCUDDER, his wife,

Plaintiff,

vs -

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

MOTION TO COMPEL PLAINTIFFS TO ELECT REMEDIES

Defendant, Florida Power Corporation, by and through its undersigned attorneys,

moves this Court for an Order requiring Plaintiffs to elect their remedies and in support thereof would show:

1. Florida Power Corporation is Defendant in Case Number 74-66, which case has been consolidated with Case Number 74-67.

2. Plaintiffs, Gilbert D. Scudder and Irene J. Scudder, his wife, by their Second Amended Complaint, seek damages against Florida Power Corporation based upon a three (3) Count Complaint as follows:

(A) Count I is an action for judgment seeking possession of certain property allegedly wrongfully held by Florida Power Corporation, and seeking damages for such wrongful possession;

(b) Count II is an action for trespass seeking damages for wrongful installation of utilities poles on the properties owned by Plaintiffs;

(C) Count III is an action for compensatory damages based on a theory of inverse condemnation, purportedly arising out of Florida Power Corporation's installation of electrical distribution facilities upon property owned by Plaintiffs.

3. This cause is presently scheduled for Pre-Trial Conference to be held on January 15, 1976 at 10:45 a.m. in Tavares, Florida, at which time proposed jury instructions are to be submitted, all motions are to be concluded,

and counsel prepared to make disclosure of fact and stipulate as to evidence and facts.

4. Florida Power Corporation would show that Plaintiffs' Second Amended Complaint in alternative Counts presenting separate remedies, which are mutually exclusive.

WHEREFORE, Defendant, Florida Power Corporation, requests this Court to enter its Order requiring Plaintiffs to make an election of remedies, and require Plaintiffs to further file and serve such election of remedies within a reasonable time, sufficiently prior to the Pre-Trial Conference date so as to enable Defendant to adequately prepare for said Pre-Trial Conference.

C. Brent McCaghren, Esq.
WINDERWEEDLE, HAINES, WARD
& WOODMAN, P.A.
P.O. Box 880
Winter Park, Florida 32789
Attorneys for Defendant,
Florida Power Corporation

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to: Jack B. Nichols, Esq., NICHOLS & TATICH, P.A., at Suite 1110, The Hartford Building 200 East Robinson Street, Orlando, Florida, 32801, Attorneys for Plaintiffs, and to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida 32787, Attorney for Defendants Folsom, this 9th day of October, 1975.

Attorney

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L.M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

MOTION TO QUASH

Come now the Plaintiffs, GILBERT D. SCUDDER and IRENE J. SCUDDER, by and through their undersigned attorneys, and move this Court to quash its Order for non-jury trial issued on the 28th

day of October, 1975, for the following reasons:

1. Plaintiffs' Second Amended Complaint in the cause sues for relief in both law and equity and seeks general, special and punitive damages against the Defendants and request trial by jury.

2. Plaintiffs are entitled to a trial by jury on all legal issues of fact raised by the pleadings and necessary to make a determination of the damages sustained by the Plaintiffs by reason of the acts of the respective Defendants to this cause. The law is clear in Florida that when legal and equitable issues are pleaded and a timely demand for jury trial has been properly made, the legal issues must be submitted to the jury even though its decision will conclude the equitable issues. See Westview Community Cemetery v.

Lewis, 293 So. 2d 373 (Fla. App. 4th 1974).

3. This Court's Order dated October 28, 1975, on its own motion has the effect of denying the Plaintiffs a trial by jury and their constitutional right of a trial by jury. See Westview Id. at 375.

4. The Court has orally indicated it will take testimony and evidence at the hearing it has set on December 18, 1975, to decide issues of fact. Such action on the part of the trial court when trial by jury has been requested by a party invades the province of the jury to decide questions of fact and is therefore a denial of due process of law to the Plaintiffs and a denial of Plaintiffs' constitutional right to a trial by jury as recognized by the law of this State since law and

equity actions have been merged.

WHEREFORE, Plaintiffs move this Court to quash its Order for non-jury trial.

I HEREBY CERTIFY that a true copy hereof has been furnished by delivery to C. Brent McCagrhen, Esquire, Winderweedle, Haines, Ward & Woodman, P.A., 250 Park Avenue, Winter Park, Florida 32789, Attorneys for Defendant Florida Power Corporation, and to John H. Rhodes, Jr., Esquire, 535 South Dillard Street, Winter Garden, Florida 32787, Attorney for Defendants Folsom, this 9th day of December, 1975.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY,
FLORIDA

CASE NO. 74-66

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION,
a Florida corporation,

Defendant.

GILBERT D. SCUDDER and
IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and
PAULINE FOLSOM, his wife,

Defendants.

ORDER NUNC PRO TUNC

This cause having come before the Court on the 12th day of December, 1975, on Plaintiffs' Motion to Quash, and the Court having heard argument

of counsel, having reviewed the file and being otherwise duly advised in the premises, and the Court file apparently reflecting no Order concerning the Court's ruling at the aforesaid hearing, it is therefore

ORDERED AND ADJUDGED nunc pro tunc that Plaintiffs' Motion to Quash is denied.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida, this 26th day of April, 1977.

Circuit Judge

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to: C. Brent McCaghren, Esq., P.O. Box 889, Winter Park, Florida 32790, John H. Rhodes, Esquire, 525 South Dillard Street, Winter Garden, Florida

and Jack B. Nichols, Esquire, P.O. Box 33, Orlando, Florida 32802, by mail this 20th day of April, 1977.

Secretary to Judge

STATUTORY WAY OF NECESSITY

COURT'S FINDING

WHEREUPON, FOLLOWING ARGUMENT BY COUNSEL ON DEFENDANT'S FOLSOM'S MOTION FOR STATUTORY WAY OF NECESSITY, THE FOLLOWING PROCEEDINGS WERE HAD ON FEBRUARY 19, 1976:

THE COURT'S FINDING:

THE COURT: Gentlemen, I've heard enough argument in this case and I know exactly what I'm going to do and I know where I'm going from here.

It is the ruling of the Court on the Defendant Cross-Claimant's claim involving a prescriptive easement, a common-law easement, and a statutory way of necessity, that the Defendants Folsom in this case have a statutory way of necessity as provided in 704.01(2),

this statutory way of necessity existing over and upon a road right-of-way along the shoreline of Flat Lake from the western terminus of Phil Peters, or, Clay Pit Road, to the west boundary of Section 12, Township 26 South, Range 23 East.

The Court establishes this route as and upon the location of the existing clay surface road approximately fifteen hundred and forty feet in length and thirty feet in width.

STATUTORY WAY OF NECESSITY

THE COURT'S FINDING

Now, based upon that ruling and the request of the parties to determine damages that are contemplated by 704.04, the matter of determination of the compensation to be paid as requested shall be heard by jury trial of the six jurors selected in panel "A", or the first panel, however we designated it, with the alternate juror number seven being the first selected in the panel "B" on the front row, Mr. Alfred T. Johnson.

I'm ready to proceed.

MR. NICHOLS: Your Honor, may we have a brief recess, about five minutes?

MR. McCAGHREN: Your Honor, before we recess if I might be

heard just a moment, and that is if I understood as the Court was determining the statutory way of necessity which my client has placed and has lying over that route, certain utility poles and lines which is included under 704.01(2), I didn't hear the Court make any mention as to that way of necessity being inclusive of that.

THE COURT: The statute so provides for that.

McCAGHREN: Yes, Your Honor,

STATUTORY WAY OF NECESSARY

THE COURT'S FINDING

THE COURT: The acquisition of a right-of-way of necessity carries with it the - - - under the statute, it's my understanding of the statute, it negates any trespass action that - - -

MR. McCAGHREN: Correct, Your Honor, and the easement acquired is the easement in the name of and on behalf of the landowner, it's not an easement that runs in the name of Florida Power. It's an easement that runs to the Defendant Folsom for his use to provide both ingress and egress, telephone and electrical power.

And so the easement granted, as the Court has just indicated, would be easement granted of a temporary nature to Mr. and Mrs. Folsom, which

would negate any compensatory position on behalf of my client.

THE COURT: It's my understanding that under 704.01(2) originally as enacted, the land-locked owner seeking a right-of-way of necessity could establish that right-of-way over the property by means of building a road, doing what was necessary and required. And it wasn't until the constitutionality of that was raised that 704.04 came into existence, when they said that in the event the landowner who is subjected to this, then comes in and complains, he is en-

STATUTORY WAY OF NECESSITY

COURT'S FINDING

on damages as far as Florida Power, punitive and compensatory.

MR. NICHOLS: Yes, sir, I understand.

THE COURT: The question of trespass and the question of damages for the taking.

MR. NICHOLS: Yes, sir, I understand that. What I was - - may we have a moment to confer.

THE COURT: Let's take a short recess.

BRIEF RECESS

WHEREUPON, AFTER A SHORT RECESS COURT RECONVENED AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: I want to say

that out of the presence of the court reporter there has been a stipulation and agreement between the parties. Number one is

STATUTORY WAY OF NECESSITY

COURT'S FINDING

that based on the ruling of the Court as to the existence of a statutory way of necessity, exclusive of the common-law right as provided in 704.01(2), as to the existence of that, the parties are now willing to submit the matter of damages and the question of trespass, that is, damages for the taking of the right-of-way to be compensated to Gilbert D. Scudder by L. M. Folsom and Pauline Folsom, an award based upon those damages for the taking of the right-of-way, and the question of the trespass, both as to damages, compensatory and punitive, against Florida Power Corporation, to the sole determination by the Court. And that the jury in this case previously empaneled may forthwith be discharged.

Is that the stipulation and agreement and consent of the parties?

MR. RHODES: That expresses the idea of the Defendants Folsom, Your Honor.

MR. NICHOLS: Yes, Your Honor, we would be agreeable to presenting those two issues to the Court.

THE COURT: All right.

MR. McCAGHREN: Your Honor, I must apologize, I came in the middle of that stipulation, but

And then, we have Mr. Pugh and Mr. Scudder himself testifying, to their knowledge, "Of grove vehicles going around there. Hunters going around by the lake."

I would submit that since the late Forties, the shore front of Flat Lake across the southern portion of now the Scudder grove, that's always been used as a route for property owners lying to the west to get to and from their property.

Thank you, your Honor.

MR. NICHOLS: May it please the Court.

Your Honor, it's incredible to me that we should be in that position, as Plaintiffs in this suit

filed an action for trespass - "for tresspass" - that has admittedly occurred before Mr. Folsom - even on this property - that is an admitted, conceded fact, that Mr. Folsom put the road in on Mr. Scudder's property without legal right to do so.

No claim of right. And claim of right, your Honor, is the whole test of adverse possession. And, if he had no claim of right, when he put that road in, and then, he closed after the fact, you can't go in and clean up a tort, an intentional tort, by an after the fact action of buying the property.

IN THE CIRCUIT COURT OF
FIFTH JUDICIAL CIRCUIT
FOR LAKE COUNTY, FLORIDA

GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, a Florida corporation,

Defendant.

CASE NO. 74-66

GILBERT D. SCUDDER and IRENE J. SCUDDER, his wife,

Plaintiffs,

vs.

L. M. FOLSOM and PAULINE FOLSOM, his wife,

Defendants.

CASE NO. 74-67

PRE-TRIAL STIPULATION

Pursuant to the Order of this Court dated October 28, 1975, counsel for the respective parties met on December 1, 1975 at 4:00 o'clock P. M. in the office of Plaintiffs' counsel. Plaintiffs'

counsel announced to Defense counsel his intentions to file a motion objecting to the sua sponte Order of the Court bifurcating the issues in this case into two evidentiary trials in which the Court has decided to determine questions of fact. The parties thereafter stipulated to the following items relative to the non-jury trial scheduled by the Court for December 18, 1975, commencing at 9:30 o'clock A. M.:

1. That the issues to be tried on December 18, 1975, by the Court without jury are:

a. Whether Plaintiffs are entitled to have an Order ejecting both defendants from the Plaintiffs' property more particularly described below.

b. Whether Plaintiffs are entitled to injunctive relief against Defendants Folsom for use of Plaintiffs' property in Lake County, Florida, more particularly described below.

c. Whether the actions of Defendant Florida Power Corporation constituted a taking of the Plaintiffs' property by inverse condemnation.

d. Upon Defendants Folsom's Counterclaim, whether said Defendants had certain rights to the use of the Plaintiffs' property upon one of the following legal theories:

(1) Rights of common law easement;

(2) Statutory way of necessity;

(3) Prescriptive easement.

e. That the Defendant Florida Power Corporation has filed an affirmative defense that it had a right to go upon Plaintiffs' property and do that which it has done on Plaintiffs' property under the rights of Defendants Folsom to do so and as agent for Defendants Folsom.

2. That Gilbert D. Scudder and the estate of Irene J. Scudder, deceased,

have been at all times material herein the owners of that certain tract of land described as:

> SW¼ of NW¼ of Sec. 12 Tp. 23 S. R. 26 E. and W½ of SW¼ of Sec. 12 Tp. 23 S. R. 26 E., Lake County, Florida, containing 120 acres more or less,

which is the subject of this litigation, from February 25, 1957, to the present date.

3. That L. M. Folsom and Pauline Folsom, his wife, have been the owners of that certain tract of land described as:

> E½ of SE¼ of Sec. 11 Tp. 23 S. R. 26 E., Lake County, Florida,

from April 17, 1973, to the present date, and that said property is adjacent to and lies immediately west of the south 80 acres of the Plaintiffs' aforesaid property.

4. That the aforementioned properties of the Plaintiffs and Defendants Folsom do not lie within the boundaries of any incorporated municipality.

5. That the Defendant Florida Power Corporation installed poles and electrical power lines upon the property described in paragraph 2, above, sometime after April, 1973, without obtaining the prior consent of Plaintiffs and without contacting Plaintiffs prior to said action being taken by the Defendants.

6. That Defendants Folsom caused clay to be placed upon Plaintiffs' property described in paragraph 2 above, and caused same to be graded as a road in or after April, 1973, without prior contact with the Plaintiffs and without obtaining Plaintiffs' consent, and that said Defendants have used said property for ingress and egress to the property described in paragraph 3, above, since the purchase of same by Defendants Folsom.

7. That counsel for the Plaintiffs and the Defendants have agreed to meet within the next two weeks and at least three (3) days prior to trial to review

their respective chains of title and copies of deeds upon which each party intends to rely in an attempt to reach a stipulation as to the most efficient manner of presenting the historical title evidence to the Court.

8. That Plaintiffs erected a fence upon their common property line with the Defendants Folsom on or about October 22, 1973.

9. Notwithstanding any stipulation to introduce title chains without certified documentary evidence, each party reserves the right to introduce certified copies of deeds in their respective cases.

10. The Plaintiffs announced their intent to call the following persons as witnesses:

Gilbert D. Scudder, Plaintiff
Hank Scudder, Plaintiff's son
L. M. Folsom, Defendant
Pauline Folsom, Defendant
Rod Rowe

Gary Holden
Raymond Crawford
Fred Davis
Frank Cappelman
Gene Cappelman
Chloe Brown
John H. Rhodes, Jr.
Charles Porvell
Glenn Thomas
Bill britt
Ann Sweeney
John Minor
William Hartzog
Edward Vick
Wayne Pugh
Representative from Southern Fruit Company
Edward J. Gurney
John Skolfield
Nixon Butt
David Hurd
Robert Tope
John Russell

Richard J. R. Parkinson

Any person named in any deposition or Answers to Interrogatories filed in this cause

Any person listed by any other party as a witness, or called as a witness by any other party in this cause

11. The Defendants announced their intentions to call the following persons as witnesses:

Frank Cappelman

Ward Britt

T. D. Tisdale

Chloe Brown

Charles Hawthorne

Ray Nicholson

C. A. "Blossum" Davis

Gary Holden

Glen Thomas

Rod Rowe

Plaintiff Gilbert D. Scudder

Defendants

Wayne Pugh

Doug Saddler

Joseph Caruso

Robert Freeman

Michael Donoghue

Donald E. Stephens

12. The parties agreed to provide opposing counsel and address and/or telephone numbers of those witnesses listed which opposing parties are unable to locate at least one week prior to trial.

13. It is also announced that representatives of the Lake County Road Department, Lake County Tax Assessor's Department, Clerk of the County Commission, and Clerk of the Circuit Court may be called by any party to authenticate documents or actions taken by their respective departments regarding facts relative to this case.

14. The Plaintiffs presented to the Defendants a series of color and black and white surface and aerial photo-

graphs and plat type drawings of the subject property and surrounding property which Plaintiffs indicated they intend to present at trial.

15. Defendant Folsom produced an aerial photograph dated February 24, 1947, and an aerial photograph dated March, 1972, and Plaintiffs made no stipulation as to the admissibility of said photographs.

16. Defendant Florida Power Corporation indicated its witnesses would be called from the witnesses listed by the Plaintiffs and Defendants Folsom, including a representative of the Tax Assessor's Office and Lake County Road Department, and a representative of Florida Power Corporation.

17. In conclusion, the parties agreed and stipulated to continue to communicate with each other regarding any subsequent stipulations or testimony of witnesses in order to present the facts

to the Court as efficiently as possible. It was agreed that the parties may continue to depose witnesses listed for discovery purposes.

/s/ C. Brent McCaghren
C. BRENT McCAGHNREN, ESQ., of
Winderweedle, Haines, Ward & Woodman, P. A.
P. O. Box 880
Winter Park, Florida 32789
Attorneys for Defendant Florida Power Corporation

/s/ John H. Rhodes, Jr.
JOHN H. RHODES, JR., Esquire
535 South Dillard Street
Winter Garden, Florida 32787
Attorney for Defendants Folsom

/s/ Jack B. Nichols
JACK B. NICHOLS, Esquire, of
Nichols & Tatich, P. A.
Post Office Drawer 33
Orlando, Florida 32802
Attorneys for Plaintiffs

L. M. FOLSOM, NICHOLS CROSS

A. Not since '73.

Q. '73 was when you purchased this property?

A. Right.

Q. What date did you purchase the property?

A. I believe it was in April of '73.

Q. April 17th?

A. I believe - I'm not sure of the exact date.

Q. The fact of the matter is, you had an employee of yours out there working on the property and building this road even before you closed on the property, didn't you?

A. I had men working, yes.

Q. And he was putting in this clay road before you closed on the property?

A. Yes, Sir.

Q. Did you ever check with Mr. Scudder, your neighbor, about building the road there?

A. No, I didn't. I didn't know somebody else owned that property.

L. M. FOLSOM, NICHOLS CROSS

Q. You didn't know somebody else owned it?

A. I thought this was access to my property.

Q. Did you ask anybody about this?

A. No, I didn't.

Q. Did you, prior to purchasing it, did you have any type of an opinion rendered by a private insurance company or anybody?

A. No.

Q. And the fact of the matter is, you have never spoken to Mrs. Sweeney about access to your property in that direction?

A. No, I haven't.

Q. You never spoke to Mr. Caruso of Southern Fruit?

A. No, Sir.

Q. And the fact of the matter is, you put that clay down there to stablize it so you wouldn't get stuck, didn't you?

A. I would say that was the reason I put the clay down there, yes.

MR. NICHOLS: Thank you, No

GLENN THOMAS, RHODES DIRECT

Q. Had you, in the previous survey, located the eastern bound-ary of Mr. Folsom's property?

A. Yes.

Q. When you performed this survey on the 14th of February, of this year, did you re-establish that boundary line?

A. Yes, that was re-established and the intersection point was established on the section line and the center line of the drive to be located.

Q. As a result of this survey in February, do you know what the distance is from the Clay Pit Road to the eastern boundary line of the Folsom property following the curvature of the area that appears to have been improved with clay?

A. Yes.

Q. What is it?

A. I might say that it could be variable because there was no research made as to the description of Clay Pit Road, but by the intersec-tion method which was used, that distance was fifteen hundred and forty feet.

Q. When you were survey-ing the property earlier for Mr. Folsom, did you do any survey

pointer, indicate where - - - do you recognize this Plaintiff's Exhibit A, for identification and, if you do, could you describe where you did your measuring?

A. I started right here (indicating). That's the Phil Peters Road right there (indicating) is it not?

Q. This is Phil Peters Road here (indicating).

A. All right, yeah, going down here. I started right there (indicating) where it comes off there, maybe seventy-five hundred feet from where that looked like you'd go straight across the lake and I measured on across to that gate and fence over there.

Q. Yes, Sir. Is it along

that route that you checked the depth of the clay?

A. Yeah, in three places. One, right close here (indicating). Another right close to the pump house and one down in that vicinity there (indicating) where the clay looked like it started getting shallow.

Q. And, Sir, would you please advise us what you saw in that connection?

A. Well, the first place, right up in here (indicating) I measured about twelve

inches of clay. Down in here (indicating) it was right at ten to twelve inches and over right up close to here (indicating) just before or about three or four hundred feet from the gate there, it was about six inches of clay.

Q. Did you measure the distance of that road?

A. I did.

Q. And what distance was that, sir?

MR. McCAGHREN: Your Honor, we would object to this unless the witness is qualifed in terms of - - - we have testimony of a surveyor who testified the means

to determine the length of the road and, if this witness is being offered in an expert capacity in terms of his ability to measure distance, I think we should have some qualification in that regard.

MR. NICHOLS: Your Honor, I

DAVID HURD, NICHOLS DIRECT

A. We would probably harrow about five times a year.

Q. Is it possible to harrow down to the lake with the road there?

A. Would you repeat that please?

Q. Would it be possible for a grove service to harrow down to the lake with the road in its existing place?

A. Not without going across the road, harrowing the road.

Q. Did Mr. Scudder request you to do anything to his property after you had reported to him - - or did you report to Mr. Scudder what you'd seen?

A. He, I guess he got a report from somebody else.

Q. Did you receive instructions as to anything you were to undertake to do at that point?

A. Mr. Scudder instructed me to place a fence across the property there at the beginning of the property and posted signs.

Q. And did you do that?

A. Yes.

Q. Do you recall when you did it?

A. No, Sir, I don't. I just recall doing it.

Q. And did you return to the property within sometime shortly thereafter and observe any change in that condition?

A. As well as I remember, it was within the next forty-eight hours, I returned to the property and notice that the fence had been cut and the pole that I had in the middle of the road had been pulled out and the signs were all laying over to one side.

Q. Thank you. Sir, is that an accurate representation of the appearance of the fence line that you observed upon returning to the property (photograph handed to the witness), after

you had installed the fence?

A. (Witnesses examining photograph) Yes. Uh-hum.

(There was a conference between Mr. Nichols and Mr. Hovis)

MR. NICHOLS: Are you going to wait until Mr. Russell comes back?

MR. HOVIS: Well, I'm going

L. M. FOLSOM

DIRECT- NICHOLS

A. Most of the time.

Q. Did Mr. Davis tell you what the problem was or what the delay was?

A. He just said that the engineers were working on it, they were trying to get a route.

Q. The engineers were working on it?

A. Evidentally before they're approved they have to go through them.

Q. Do you recall how many days went by, how much delay there was?

A. No, I don't.

Q. Do you know on what date you actually got power?

A. I believe it was in November.

Q. Did you observe them installing the power line?

A. I sure did, I'll never forget it.

Q. Why is that?

A. Well, I'd been living out there about six weeks prior to this, I had a trailer out there. And the day that they were putting the power in I was working on my fireplace and I looked out the window and I seen the power

trucks coming around the corner.

Q. And did you traverse the road between your property and Avalon, Clay Pit Road, there, daily, while they were installing this?

A. They installed it in one day. They were installing it down Clay Pit Road a couple days.

Q. Pardon me?

A. I said it took a couple days for them to come down Clay Pit Road.

Q. Did you observe them putting in the poles on the Scudder property?

A. The last one I seen put in was at the end of the road.

Q. When you say the end of the road, do you mean on the Scudder

side of your fence?

A. One of the two poles out there.

Q. That is to the east of your property line?

A. Yes.

Q. At that point did you know who owned the property to your east?

A. Yes, I did.

Q. And that was because Mr. Rowe had told you?

A. No, sir, it was because you had told me.

Q. I had told you?

A. Yes.

Q. So that was done after you had received notice from us?

A. Yes, it was.

Q. And did you advise Florida Power that you had received notice from us?

A. No, I didn't.

Q. You then knew at that point in time that there was some question about the property between you and Clay Pit Road, did you not?

A. Yes.

Q. Did you communicate

that fact to anybody connected with Florida Power?

A. No.

Q. Did you contact Mr. Scudder or did you advise my office that you had applied for power and that it would be coming over the Scudder property?

L. M. FOLSOM

A. No.

Q. Why not?

A. I had applied for the power back in April.

Q. I thought you said you had rushed them along, pushed them into action?

A. Well, yes, sir; I applied in April and it was November before I got it.

Q. It was October the 15th that you signed the easement, wasn't it, the document that I just showed you?

A. Yes, sir.

Q. At that time had you received the communication from my office, or Mr. Skofield, the letter that you made reference to?

A. I don't know, I don't remember when I signed. Actually, I don't

remember the date that's on that one, the one I just looked at.

Q. At the time you signed that easement did you know about Mr. Scudder owning the property to the east and objecting to your use of his property?

A. It's possible. If I knew the date that I received the letter from you and the date that I signed.

MARVIN LOGUE

DIRECT - NICHOLS

WHEREUPON, THE PLAINTIFFS CALLED TO THE STAND MARVIN EDWARD LOGUE, SWORN BY THE CLERK.

DIRECT EXAMINATION:

MR. NICHOLS:

Q. Would you please state your full name, please, sir?

A. Marvin Edward Logue.

Q. And what is your address?

A. 1506 Croton Drive, Maitland, Florida.

Q. Do you work for the Florida Power Corporation?

A. Yes, I do.

Q. How long have you been so employed?

A. I've been with Florida Power for fifteen years.

Q. And what is your

position or title in that company?

A. Well, my classification is clerk, but my duties is preparation of company easements for the

Eastern Division.

Q. Do you have a specific job assignment in this regard?

A. Yes, sir.

Q. And what is that?

A. That's to take the information that I receive from the engineers and prepare -- -- if easements are necessary, I prepare them.

Q. When you say "take the information from the engineers", where are you physically located?

A. I'm in Winter Park, in the engineering department.

Q. You're in the engineering department?

A. Yes, sir.

Q. So it's just a matter of collaborating or coordinating within one office building?

A. Yes, sir.

Q. And would you please tell us, sir, what your background is for the job that you're performing? What is your educational background?

be shown the witness has this knowledge. He said his job was preparation of the easements and not the engineering itself. I don't think that's proper predicate for the question of this particular witness.

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. In determining, sir, what easements are to be required, to what do you refer?

A. Whether they're going to be required?

Q. Yes.

A. If the proper information is not passed on to me by the

engineers, I sometimes have to come up here to the County Courthouse and make an investigation of the County records.

Q. All right. What is the information, when you say if the proper information is not communicated to you, what are you talking about?

A. Well, a legal description of the property and the location of the facility.

Q. Are you qualified to read legal descriptions?

A. I've had -- -- may I ask you what you mean by that?

Q. Well, when a legal description is presented to you, are you able to read it and to interpret it?

A. Yes, sir.

Q. What training have you had to do that?

A. Just on the job training. Over the years I've read legals and followed them out with scale

and pencil.

Q. You're not a lawyer, are you?

A. No, sir.

Q. You haven't been trained as a lawyer?

A. No, sir.

Q. So then you take the legal description that you get from the engineering department and determine whether or not that is sufficient?

A. I assume that it's sufficient, yes, sir.

Q. Does the engineering department make the decision on the legal, or do you?

A. Now, as to whether it is correct or not, I can't determine that, no, sir.

Q. Okay. As a matter of fact, in this process of determining and preparing the easements, your legal department is not involved, is it?

MR. McCAGHREN: Objection to the form of the ques-

tion, Your Honor, leading the witness.

MR. NICHOLS: I'll strike it.

MARVIN LOGUE

DIRECT - NICHOLS

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Is your legal department involved in the ordinary course of events in preparing the easements as you have stated you do?

A. No, sir.

Q. If you determine, then, from the information that is presented to you by the engineering department that the legal description is insufficient, what do you do?

A. I go back to the engineer. Well, in some cases I'll come up here and check the legal descriptions in the courthouse, either on a deed or on the tax records.

Q. You drive from Winter Park, if it's in Lake County, to the

Tavares courthouse?

A. Yes, sir.

Q. And you check the tax rolls?

A. Yes, sir. If I have a question about any easement.

Q. If you have a question about it.

A. Yes, sir.

MARVIN LOGUE

DIRECT - NICHOLS

Q. Is this solely within your judgment as to whether or not a question should be raised?

A. Well, apparently that's what my supervisors expect me to do.

Q. And when you get to the Lake County courthouse, if you determine that it's necessary, then what do you do?

A. Well, I just explained that. I go to the tax records and read the legal description clauses, or if something seems to be omitted in the legal description, I'll ask some of the people down there in the office to check it out for me. This is something that I've been doing for some time and the procedure for me is more or less standard.

Q. Okay. Do you also

check with the Road Department for permits to put lines along the road?

A. Yes, sir, that comes within my area of responsibility, too. I do not prepare the permit, I only process them.

Q. But you make the contact with the necessary County agencies for that purpose?

A. Yes, sir.

-ern approach to the Folsom property across the route where the lines are now situated?

A. I may have been asked by Mr. Harris to check the possibility, after the matter being brought to his attention.

Q. I'm talking about prior to that.

A. Prior to that time, no, sir.

Q. Do you know whether or not you have ever checked the public records of Lake County, Florida, as to the ownership of the property between Clay Pit Road terminus with Flat Lake to the Folsom property in the southeast quarter of the southeast quarter of Section 11?

MR. McCAGHREN: Objection, Your Honor, to the form of the question. It is also repetitious, he's asked it before. It's also vague and indefinite as to point in time.

THE COURT: It's my understanding that he testified he didn't go to the courthouse.

MR. McCAGHREN: Yes, sir, I just want to make sure that's understood.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Did you check the records with regard to the ownership of Mr. Folsom's interests in the southeast quarter of the southeast quarter of Section 11, or any property in Section 12-23-26 Lake County?

A. When?

Q. Excuse me, at the

time that this work order was in process in your department?

A. As I explained, I don't recall coming to the courthouse on this request.

Q. Well, what reason, if any, do you have for not having done so?

A. Well, I was supplied with the legal description of the property.

Q. Who supplied that to you?

A. The district office. And the drawing which was provided me indicated that the road terminated at Mr. Folsom's property.

Q. Okay, when you say you were supplied, this map that you have in front of you here, -- --

A. I was supplied with this map.

Q. Well, you indicated a while ago you just walked down the hall and that you had seen this large engineering drawing after May 17, '74, and -- --

MR. McCAGHREN: Objection, Your Honor, the document itself is after the point in time.

THE COURT: Objection sustained. He couldn't have seen it while he was preparing the work order because it wasn't prepared at that time.

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. Isn't it a fact that you also relied upon information sent to you from the district office?

A. That's my practice, yes, sir.

Q. And in this instance did you make a special point of communicating with Mr. Fred Davis concerning the question of who owned the property over which this easement was

to pass?

MR. McCAGHREN: Objection,

Your Honor, unless it's more clearly defined what Mr. Nichols means by "special effort". I'm not sure I understand what he means by that.

MR. NICHOLS: I will delete the term "special effort".

DIRECT EXAMINATION CONTINUED:

MR. NICHOLS:

Q. Did you contact Mr. Davis with reference to the question of who owned the property over which the route was proposed?

A. My recollection was that we did have conversation about it, yes.

Q. And this was before

you prepared the easement?

A. Yes, sir, to my recollection it

was.

Q. And was it based upon that conversation that you decided not to go to the Lake County courthouse and check the records?

A. That, partially, and with this drawing. I called him, because this drawing didn't show a property line here, so I called to verify that it was going up to the east property line of the property.

Q. Did you have aerial photographs of Lake County and Flat Lake?

A. No, sir.

Q. Where are those photographs located?

A. Aerial photographs?

Q. Yes.

A. Here at the courthouse.

Q. In Lake County?

A. Yes, sir.

Q. Did you come to Lake County - -

A. They're the only ones that I have knowledge of. Now, we may have an old ancient plat book, Lake County plat book in our office, but I certainly wouldn't want

to rely on it.

Q. Did you go to that and look at that?

A. No, sir.

Q. Did you come to Lake County and look at the aerial photographs of the Sections?

A. No, I didn't feel like it was necessary. I felt that I had the information that I needed to prepare this easement.

Q. Flat Lake was on this drawing that you had, wasn't it?

A. Yes, sir, it is on there.

Q. And by the location of Flat Lake, would it have been on the tax assessor's records in relation to the property that Mr. Folsom owned?

A. It probably would have.

Q. And Mr. Scudder's property would have been located on there, too, wouldn't it?

A. It probably would, yes, sir.

Q. And by looking at that map you would have been able to tell whether Flat Lake and Folsom's property was in Section 11 or Section 12, wouldn't you?

HOWARD GILKES

DIRECT- NICHOLS

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Are there any legal personnel, lawyers, trained attorneys, who review any of this work at this point?

A. I'm not sure what the line of relationship is between Marvin Logue and our legal department and our easement department in St. Petersburg.

Q. Marvin Logue, then, would be the best advise on that?

A. Well, his immediate supervisor is right there, which is Jan Hendricks. But he has a direct responsibility to St. Petersburg; he sends them information and they send him

information. I don't know what his connection is there, though.

Q. As an engineer and doing the type of work you do, is it necessary for you to know some of the rudiments of surveying?

A. We do not do surveying.

Q. Well, how do you know, when you are out in the field and you're going to put a line down a road, how do you know where the center line of that road is, or that

HOWARD GILKES

DIRECT - NICHOLS

Section line, or whatever, to know where to place your poles?

A. Well, that's a good question, and a good example was this drawing I just got through doing right here. We had a County road that we had to build a mile line down, and if you've been on that road, as I know you have, it's not a straight road. And if you look on a map, like this map right here, it looks pretty straight. But you go out there in the field and it's not straight. Yet, you've got to ---- I'm talking about engineers in general, he's got to build a line and he knows it's got to be straight. And to follow along the south side of that road with line with the line, it involves anchors, plus you know it's in the wrong place because technically, legally, that road is

straight on the map.

So, what you do is, you use your eye and you look for the straight line. And just exactly where you place that pole with regard to the middle of a dirt road that meanders, there's no pretense of precision involved in exactly where that pole should be when you say, "Well, it ought to be one foot off the road right-of-way, inside the road right-of-way". You don't go by that.

Obviously that's where we try to get it, one foot inside the road right-of-way. But how could

we eye-ball something like that and do it everytime? It's practically impossible.

Q. Well, doesn't Florida Power use surveys"

A. Not in distribution lines. They do in transformers.

Q. Never in distribution?

A. Not to my knowledge. Because they haven't got any surveyors.

Q. Do you obtain permits from the County as to where you're going to put a line, and that kind of thing?

MR. McCAGHREN: Objection, Your Honor, unless it's put in reference to a point in time.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. Were you at that point doing that, obtaining permits back in 1973?

A. Did we obtain permits back in '73?

Q. Yes, sir. For distribution lines?

A. Did we obtain them for this job?

Q. Yes, sir.

A. No, and it's not unusual that we didn't. Because we already had a line on that road and it was an extension of an existing line. And back in those days there was a rule

that you could extend down an existing road from an existing line and it did not require a County Road permit. But today it is different.

Q. Okay, sir, then the information as I understand it is, this line from the south side of Clay Pit Road eye-balled to here?

A. That's right. Well, now, there was a fence down here. You need to go by whatever you find in the field. And there was a fence. As a matter of fact,

when we staked this line we started from this end, because this was where the fence was. Now, there's no guarantee that the fence was on the road right-of-way. But I've got to go on the best information I've got, and that fence was the best thing that I had. So I started down from the point of that fence. I started just being inside that fence, just north of that fence as far as the fence went until it ran out. Which wasn't very far.

Q. But you didn't know -

A. And from there on it was eye-ball.

Q. But you really didn't know whether you were in the road right-of way or not at this point?

A. No, there was no insurance, but it wasn't any big problem because if it wasn't and somebody told us that we weren't, we'd be glad to move into it. It's not that big a deal. In other words, our alternative is to have a stand-by survey crew at a big expense, or just to move a few poles whenever we have to if somebody requests us to over an easement.

Q. Was this just a minor job, to run a line a mile or so down the road and then, what is it, back how many miles or half a mile, or whatever it was?

A. It wasn't more than half a mile. The whole line was little over a mile and a half long. That's not a big deal.

Q. You didn't feel that a survey was necessary?

A. Definitely not. You'd be laughed at if you did have an actual survey by the rest of the crew.

Q. You would have been laughed at?

A. Well, this was unheard of. We just handled our field work.

Q. Well, isn't it important to you to know where the property lines are?

MR. McCAGHREN: Your Honor, I'll object to

this since he's trying through Mr. Gilkes to impeach the testimony perhaps of Mr. Crimmins whom he called from Sumter Electric who also

MR. NICHOLS: No, sir. I'm not arguing. I'm trying to learn the facts as to whether not there might be cases where a survey might be indicated, Your Honor, and I think the Court can draw its own conclusions from there.

DIRECT EXAMINATION

CONTINUED:

MR. NICHOLS:

Q. How would you, sir, determine where somebody's property line is in the field without a survey?

A. Well, do you want to go back to this particular case again, like where we determined the property

line was along this mile long line?

Q. Well, using this case as an example, without a survey how do you know where the property line is?

Q. Just strictly the naked eye, or unless you wear glasses, then just glasses?

A. Yes.

Q. Okay. With regard to the property line of any property owners to the north of the road and between the road, as Clay Pit Road is circumscribed as a straight line across the lake, how did you know where the property line was on the north side of the road?

A. You mean Mr. Folsom's property

A. Well, the best line there was the fence.

Q. Where, now, did you take off up the road, off the road right-of-way of Clay Pit Road, as you assumed it to be by this fence?

A. Well, sometimes you find right-of-way markers. And if I recall, there may have been some somewhere out in here, markers, which when you find those you say, "Praise the Lord", cause you know you something to go by.

Q. Does your crew have these transoms or whatever they call them, that surveyors or engineers use to get a bead on something?

A. No.